

89-662

Supreme Court, U.S.

FILED

OCT 2 1989

JOSEPH P. SPANIOL, JR.
CLERK

No. _____

**IN THE SUPREME COURT
OF THE
UNITED STATES**

October Term 1989

**MIDDLE EARTH GRAPHICS, INC.,
Petitioner**

v.

**NATIONAL LABOR RELATIONS BOARD,
Respondent**

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment and Section 8(c) of the National Labor Relations Act (29 U.S.C. Sec. 158(c)) prohibit the National Labor Relations Board from using as evidence of an unfair labor practice an anti-union statement by an employer which contains no threats of reprisal or force or promises of benefit and is thus protected free speech?
2. Whether there was substantial evidence to support the findings of fact of the National Labor Relations Board?



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Petitioner Middle Earth Graphics, Inc. (hereinafter sometimes referred to as "Middle Earth" or "Petitioner") respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the court of appeals dated April 24, 1989 and the denial of the petition for rehearing *en banc*, dated July 6, 1989, are reprinted in the Appendix. (App., *infra* 1a, 2a). The decision and order of the National Labor Relations Board (App. *infra* 3a-43a) are reported at 283 NLRB No. 156, and 126 LRRM 1010 (1987).

QUESTIONS PRESENTED FOR REVIEW

In its decision and order, the National Labor Relations Board (NLRB or Board) found "clear evidence of animus which should be considered in placing the events . . . in proper focus." The clear evidence was in fact a statement, printed and distributed by petitioner's president on a humorous poster which purported to create a new state out of Western Michigan. The offending statement in its entirety read:

Access to the State of Six-One-Six (Western Michigan) will be severely restricted. Draw bridges will be raised to keep out such undesirable elements as labor organizers, dead beats, carpetbagging politicians, and itinerant lawyers. (See Appendix F, *infra*)

On the basis of that statement, the Board found the requisite anti-union animus and thereafter held that petitioner had violated Sections 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. §158(a)(1) and (3)) by terminating employees. In so doing, the decision of the Board raises the following questions:

(1) Can the NLRB use, as evidence of an unfair labor practice, a statement which contains no threat of reprisal or force or promise of benefit, if such statement is otherwise protected free speech?

(a) If the NLRB has impermissibly used as evidence of animus a statement which is protected free speech, are the subsequent findings of unfair labor practices likewise tainted?

(b) Is the entire decision tainted where the Board has used a protected statement as evidence of animus and considered such statements when evaluating such alleged unfair labor practice?

(2) Whether there was substantial evidence to support the Board's findings of fact.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction properly obtained before the court of appeals for the Sixth Circuit pursuant to Sections 10(e) of the National Labor Relations Act, 28 U.S.C. §10(e), since the alleged unfair labor practices occurred in Kalamazoo, Michigan. The judgment of the court of appeals (App. *infra*, 2a) was entered on April 24, 1989 and a petition for rehearing was denied on July 6, 1989 (App. *infra*, 1a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for redress of grievances.

STATUTORY PROVISIONS INVOLVED

Section 8(c) of the National Labor Relations Act, (NLRA) 29 U.S.C. Section 158(c) provides:

The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Section 7 of the NLRA, 29 U.S.C. Section 157 provides:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title.

Sections 8(a)(1) and (3) of the NLRA, 29 U.S.C. Section 158(a)(1) and (3) provide:

It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

Section 10(e) of the NLRA, 29 U.S.C. Section 160(e) provides:

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28.

The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

STATEMENT OF FACTS

During a period of economic slowdown, petitioner employer transferred its employees known as "bindery workers" from petitioner's payroll to the payroll of Manpower, Inc., a temporary help agency. The National Labor Relations Board (NLRB or Board) found that the petitioner's decision to transfer bindery workers to Manpower was initially limited to those bindery workers referred to as "mergers" and that petitioner unlawfully enlarged that decision to include all bindery workers after petitioner learned of a union organizational attempt among the bindery workers. Petitioner subsequently terminated several employees who refused to transfer to Manpower.

The NLRB concluded that petitioner's decision was unlawfully motivated by anti-union animus. In finding such anti-union animus, the Board relied upon a statement contained in a poster distributed by petitioner to promote a new printing press. The poster indicated that petitioner's president was opposed to unions.

The Board issued a decision and order directing petitioner to reinstate the terminated employees and compensate them for back wages. The court of appeals enforced the Board's order without opinion. A subsequent petition for rehearing *en banc* was denied.

Petitioner seeks review of the Board's decision, which presents important First Amendment and statutory questions on which the circuits are divided, some of which are contrary to the decisions of this Court.

Petitioner, Middle Earth Graphics, Inc., is a Michigan corporation formed in 1974 and engaged primarily in commercial and specialty printing in Kalamazoo, Michigan. Louis Hall (Hall) is the founder, owner and president of petitioner. From 1974 until 1984, petitioner employed an average of 10 to 12 employees. In March 1984, Middle Earth received a purchase order from its largest customer, Cadaco, to print, cut and supply 25,000 "sets" or "games" of playing cards for a new game known as "Bible Trivia", a game patterned after the popular "Trivial Pursuit." The game became an overnight success. Cadaco then increased the purchase order and Middle Earth devoted virtually its entire operation to meeting Cadaco's production requirements. To meet these requirements, Hall hired 40 to 50 employees to work primarily in the bindery area. In the fall of 1984, the Cadaco business began to wane. Hall also experienced employee management difficulties. In November 1984, Hall met with a representative from Manpower, Inc., a temporary employment agency, and accepted a written proposal to pay Manpower a fee for transferring the bindery

workers to Manpower for payroll purposes and assuming all payroll obligations.

On November 7, the bindery workers were informed of the planned transfer to Manpower's payroll and on November 9, the first group of employees (which included primarily "merging" employees and a collator assistant) were enrolled with Manpower. On November 10, several employees met at an employee's home for the first time with a union business agent to discuss organizing a drive for the Paperworkers' Union.

On November 12, employees were informed that the deadline for enrolling with Manpower was November 15. By November 15 all but four bindery workers had enrolled with Manpower. The four bindery workers asserted a right to refuse to enroll with Manpower. Hall informed them that they would be fired unless they complied with the direction to enroll with Manpower. One individual consented; the other three were fired. Approximately one week later, an employee who had enrolled the first day announced that he had revoked his Manpower enrollment card. Hall fired him.

Between November 13 and November 29, 1984, the union filed unfair labor practices with the Board, alleging violations of Sections 8(a)(1) and (3) of the NLRA, 29 U.S.C. §158(a)(1) and (3), and on December 31, 1984, a complaint was issued. A settlement agreement was reached on April 22, 1985. Additional charges were filed between August 2 and September 26, 1985, alleging that Middle Earth had not complied with the terms of the settlement agreement and had not properly reinstated the alleged discriminatees. The regional director of the Board set aside the settlement agreement and issued an amended consolidated complaint on October 30, 1985. The hearing was held from January 28 to February 5, 1986.

The ALJ found that petitioner violated the Act when it discharged six employees. To support these findings, the ALJ first concluded that petitioner demonstrated "clear evidence of animus" in the poster distributed by Middle Earth:

1. Evidence of Animus

Quite apart from any specific violations of the Act alleged and found in this case, the Respondent (petitioner herein) demonstrated clear evidence of animus which should be considered in placing the events described herein in proper focus. Among the documents in the record is a large multi-colored bro-

chure which the Respondent (petitioner herein) has printed and circulated to advertise the capability of its new multi-color press. The document is a humorous elaboration of Hall's tongue-in-cheek proposal for a new 51st state, to be carved out of the existing state of Michigan and named Six-One-Six after the telephone area code for Western Michigan. Entitled "A New State. A New Start.", the brochure features Hall as its centerfold, dressed in regal attire and holding a sword and scepter. Also portrayed on this page are two cartoon figures, dressed as attendants from an insane asylum, who are chasing Hall and are making ready to apprehend him and place him in a straightjacket. Inside the brochure is a large map of Michigan. The eastern half is portrayed as a barren wasteland while the western half — State Six-One-Six — is shown as a flourishing, verdant paradise. At the center of State Six-One-Six is its capital, Kalamazoo. Access to Six-One-Six from Eastern Michigan is limited to a drawbridge over a moat. This feature is captioned:

Access to the State of Six-One-Six will be severely restricted. Drawbridges will be raised to keep out such undesirable elements as labor organizers, dead beats, carpetbagging politicians, and itinerant lawyers.

When asked at the hearing if he was opposed to unions, Hall replied: 'Just in Six-One-Six.' (App.*infra* at 25a-26a)

The ALJ concluded that the terminations of six employees were not for "cause" but were based on anti-union motivation. He further found that petitioner violated the Act when Hall and two supervisors made statements regarding the union.

The Board affirmed the decision and order of ALJ on May 19, 1987, in an opinion reported at 283 NLRB No. 156, 126 LRRM 1010. (Appendix C, *infra*, at 3a)

The Court of Appeals, in a per curiam decision, enforced the Board's order, without comment, on April 24, 1989. A petition for rehearing *en banc* was denied on July 6, 1989. (App., *infra*, at 1a).

REASONS FOR GRANTING THE PETITION

There are three elements required to prove a violation of Section 8(a)(3): (1) knowledge of protected, concerted activity; (2) conduct which discriminates against and discourages union membership; and (3) unlawful motivation or intent based on anti-union animus. *NLRB v. Brown*, 380 U.S. 278, 286 (1965) and *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983) ("if the employer fires an employee for having engaged in union activities and has no other basis for the discharge . . . the employer commits an unfair labor practice.").

The essential element, however, is the employer motivation. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) ("the finding of a violation normally turns on whether the discriminating conduct was motivated by an anti-union purpose.") and *NLRB v. Brown, supra*, 380 U.S. at 287 ("we have determined that the 'real motive' of the employer in an alleged § 8(a)(3) violation is decisive").

The ultimate issue in this case, therefore, is whether petitioner's decision to discharge its employees was unlawfully motivated by anti-union animus. The Board found "evidence of animus" contained in the anti-union statement in the poster. There were no threats or coercive statements in the poster, so it is without question, protected free speech. Section 8(c) of the Act prohibits the use of such statements as "evidence of an unfair labor practice." Therefore, the Board, in finding "evidence of animus" has reached the dispositive issue in a determination of whether the petitioner violated the Act. That is the error.

The decision of the Board is plainly contrary to both the express letter and spirit of Section 8(c) of the Act, which provides that such statements, "shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act. . . ." (Emphasis supplied). Although the Court has addressed the issue of freedom of speech in the labor relations context, the Board and the courts have nullified the free speech protections of Section 8(c) and they have curtailed the free expression and interchange of ideas in the workplace. Although the Board purports to respect the First Amendment rights of employers, decisions such as the case below have a substantial and intolerable chilling effect upon such expression.

The Board explains that, while the statement in the poster is not, in and of itself, an unfair labor practice, it is "evidence of animus." The Board then considered this evidence of animus in order to "place the events" in "proper focus," and determine whether it was more or

less likely that the employer committed the alleged unfair labor practice. At that point the statement became "evidence of an unfair labor practice," contrary to the express prohibition of by Section 8(c).

The courts of appeal are apparently divided on the scope of the Section 8(c) prohibition. While most circuits purport to recognize the principle of freedom of speech as it applies in the labor relations area, they are undecided as to the evidentiary weight to be given to a statement which is protected free speech. Under Section 8(c), the answer is clear — no evidentiary use whatsoever may be made of a protected statement.

Review of the Board's and the court of appeals' decisions is therefore warranted and necessary to protect the free speech rights of employers, to enforce the congressional mandate of Section 8(c) and to achieve unanimity of results among the circuits.

DISCUSSION

I. The Board's Finding That Petitioner's Statement Of Opposition To Unions Constituted Evidence of Animus Violated The Freedom Of Speech Provisions Of Both The First Amendment and Section 8(c) Of The National Labor Relations Act.

The Board's decision to use a statement which is otherwise protected free speech as evidence of animus is in violation of fundamental constitutional rights and will chill free interchange of opinions and ideas between management and labor in the workplace. An employer certainly cannot freely express his opinions if speech critical of unions may be used as evidence of an unfair labor practice.

A. DECISIONS OF THIS COURT

This Court has long recognized that where an employer's anti-union statement contains no threat it is protected free speech and may not be used as evidence against an employer.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Court found that Section 8(c) is the equivalent of the First Amendment:

[A]n employer's free speech right to communicate to his employees is firmly established and cannot be infringed by a union or the Board. Thus, § 8(c)(29 U.S.C. § 158(c)) merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an

unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8(a)(1). 395 U.S. at 617.

Likewise, in *NLRB v. United Steelworkers (Nu Tone, Inc.)*, 357 U.S. 357, 362 (1958), the Court noted:

Nor is the claim made that an employer may not, under proper circumstances, engage in non-coercive anti-union solicitation; indeed, his right to do so is protected by the so-called "employer free speech" provision of § 8(c) of the Act.

In *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), the Board found that the employer violated the Act when it announced to its employees, shortly before a union election, a new birthday holiday and increased overtime and vacation benefits. This Court affirmed the Board's conclusion as to the timing of the announcement, but refused to place any reliance on an anti-union letter to employees:

The inference was made almost explicit in Exchange Parts' letter to its employees of March 4, already quoted, which said "The Union can't put any of those ... [benefits] in your envelope—*only the Company can do that.*" (Original italics.) We place no reliance however, on these or other words of the respondent disassociated from its conduct. Section 8(c) of the Act... provides that the expression or dissemination of "any views, argument, or opinion" "shall not constitute or be evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of benefit."

See also *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966), "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." The Court in *Linn* then compared the labor-management free speech dilemma with other non-labor free speech situations:

[A]s we stated in another context, cases involving speech are to be considered "against the background of a profound . . . commitment to the principle that

debate . . . should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. 383 U.S. at 62-63.

Most recently, in the flag-burning case, *Texas v. Johnson*, 491 U.S. ___, 109 S.Ct. 2533, 105 L. Ed 2d 342 (1989) this Court reaffirmed its commitment to unlimited free expression of ideas regardless of whether there is a possibility that some may take "serious offense at the particular expression." 109 S.Ct. at 2541. The Court noted that the precedents establish that:

A principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* at 2541.

* * * *

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea because society finds the idea itself offensive or disagreeable. *Id.* at 2544

The Board's decision is contrary to these principles. There is no doubt that anti-union comment is offensive or disagreeable to some. However, rather than fostering or encouraging debate, the Board limits it. The employer is thus well-cautioned never to make any comment or express any opinion (even if in jest) which is remotely anti-union as there is always the possibility of a future unfair labor practice allegation and that the statement may be used as "background evidence" to support the allegation.

B. LEGISLATIVE HISTORY OF SECTION 8(c)

This Court's commitment to "free debate" also finds significant support in the legislative history of Section 8(c) of the Act.

The critical inquiry into the legislative history of Section 8(c) focuses on a single word: "evidence". That word was the primary source of congressional debate with respect to the entire section. It is quite clear that here, the word "evidence" has a particular significance. If Congress had only wanted to ensure that an anti-union statement would not, by itself, constitute an unfair labor practice, the word "evidence" could have been dropped from the statute as superfluous. Thus, the statute would have read:

"The expressing of any views, argument, or opinion. . . shall not constitute... an unfair labor practice. . ."

However, Congress deliberately, and over presidential veto, drafted the section to read:

"The expressing of any views, argument, or opinion shall not constitute *or be evidence of* an unfair labor practice." (Emphasis supplied.)

This Court recognized that legislative intent in *Linn v. United Plant Guard Workers*, *supra*, 383 U.S. at 62, footnote 5:

It is more likely that Congress adopted this section for a narrower purpose, i.e., to *prevent the Board from attributing anti-union motive to an employer on the basis of his past statements*. See H.R. Rep. No. 510, 80th Cong., 1st Sess. 45 (1947). Comparison with the express protection given union members to criticize the management of their unions and the conduct of their officers, 73 Stat. 523 (1959) 29 U.S.C. § 411(a)(2) (1964 ed.), strengthens this interpretation of congressional intent. (Emphasis supplied.)

An examination of the legislative history of the Labor Management Relations Act of 1947 (LMRA) establishes that Section 8(c) was indeed enacted, "to prevent the Board from attributing anti-union motive to an employer on the basis of his past statements."¹

The free speech provision was enacted in reaction to decisions

¹ 8(c) (29 U.S.C. § 158(c)) was incorporated into the National Labor Relations Act (29 U.S.C. § 151 *et seq.*), through the Labor Management Relations Act of 1947. For convenience' sake, citations to Section 8(c) refer to both the NLRA and

of the Board and courts which found violations of the Act based upon non-coercive statements of the employer. Virtually the entire debate with respect to Section 8(c) centered on whether or not a noncoercive anti-union statement could be used as evidence to demonstrate unlawful motive.

Initially there were two versions of the bill - the Senate's (sponsored by Senator Taft) and the House version (sponsored by Representative Hartley). With respect to the section which would become Section 8(c), House Report No. 245 on H.R. 3020, criticized the decisions of the Board which found an unfair practice based in part upon previous, non-coercive anti-union statements of the employer and stated the purpose for the section:

The bill corrects this, providing that nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it unless it, standing alone, is unfair within the express terms of sections 7 and 8 of the amended act. (Legis. History, Vol. I, 324) (App. *infra* at 44a).

The House Minority Report objected to the inclusion of the term "evidence":

But these provisions go far beyond mere protection of an admitted constitutional right. By saying that statements are not to be considered as evidence, they insist that the Board and the courts close their eyes to the plain implications of speech and disregard clear and probative evidence. In no field of the law are a man's statements excluded as evidence of an illegal intention. Here, again, a deep-seated intention to protect employers in the commission of unfair labor practices is evidence. Here, again, the laudable purpose of protecting free speech cloaks an evil design to

LMRA. Citations to the legislative history refer to *Legislative History of the Labor Management Relations Act of 1947*, Volumes I and II, U.S. Government Printing Office, Washington, 1959 Reprint (1985). Selected portions of the Legislative History are reprinted *infra* at Appendix E.

encourage unfair labor practices by employers. (Legis. History, Vol. I, 375-376) (App. *infra* at 45a)

The Senate version, which also criticized the Board's decisions on the issue of free speech did *not* contain a restrictive provision regarding evidence:

The committee believes these decisions to be too restrictive and, in this section, provides that if, under all circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement. The Board, of course, *will not be precluded from considering such statements as evidence.* (Emphasis supplied) (Legis. History, Vol. I, 429-30) (App. *infra* at 46a)

Ultimately, the House version was adopted by the committee:

The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law. The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination. (Legis. History, Vol. I, 549) (App. *infra* at 51a)

In the debate on Section 8(c) which followed the conference report the discussion again centered almost exclusively on the word "evidence".

Mr. PEPPER . . . Under that provision (Section 8(c)), if an employer were to say on Monday, "I hate labor unions, and I think they are a menace to this country", and if he fired a man on Thursday and the question was whether that man was fired for cause or fired because he was agitating for a union in the plant, would the statement made on Monday, in which the man said, "I think labor unions are a

menace to this country" be admissible in evidence as bearing on the question of the reason for the discharge?

Mr. TAFT. All these questions involve a consideration of the surrounding circumstances. It would depend upon the facts. Under the facts generally stated by the Senator, I think that statement would not be evidence of any threat. There would have to be some other circumstances to tie in with the act of the employer. If the act of discharging is illegal and an unfair labor practice, consideration of such a statement would be proper. But it would not be proper to consider as evidence in such a case a speech which in itself contained no threat express or implied. That is the effect of the House language which we accepted.

Mr. PEPPER. If the Senator will permit, that is the point I want to emphasize —

Mr. TAFT. That is the effect of the House language.

Mr. PEPPER. That under the criminal law at the present time any statement a man may make prior to a given act which the court may try to evaluate may be admitted in evidence as having some relationship to his intentions. But the conference report deliberately excludes statements of that sort, unless the statement contains an actual threat, thereby depriving the Board of the full evidence in the case.

Mr. TAFT. So long as the Board has a statement of that kind the employer's mouth is practically shut. In case he makes a speech later on and is charged with some unfair or unlawful labor practice, and that can be considered in evidence, it means that he cannot afford to speak at all. Without that provision there is not freedom of speech. I say that is one thing a man ought to have. He ought to have freedom of speech, and it seems to me we should put in the word "evidence." (Legis. History, Vol. II, 1545-46) (App. *infra* at 54a-55a)

Senators Morse and Murray were also among the critics of the conference report.²

The House version was ultimately adopted and sent to President Truman, who vetoed it. In his veto message, the President made specific mention of Section 8(c):

The bill would introduce a unique handicap, unknown in ordinary law, upon the use of statements as evidence of unfair labor practices. An anti-union statement by an employer, for example, could not be considered as evidence of motive, unless it contained an explicit threat of reprisal or force or promise of benefit. (Legis. History, Vol. I, 915, 918) (App. *infra* at 63a)

The veto was overridden by Congress and the House version of Section (c) became the law. Despite this abundantly clear discussion between both the proponents and opponents of Section 8(c) and this Court's discussion of that section in *Gissel Packing, Linn v. United Plant Guard Workers*, *Exchange Parts* and *NLRB v. United Steelworkers*, *supra*, the Board and the courts have continued to do precisely what is forbidden by statute and by the First Amendment. They continue to use employers' protected statements as evidence of anti-union motive and unfair labor practices.

In this case petitioner's statements in the poster contained no threats, coercion or promise of benefit. The employer's speech is protected by Section 8(c) and by the First Amendment. The Board contends that it is not using the statement as "evidence of unfair labor practice" but merely as "background" evidence of animus, "which shall be considered in placing the events described herein in proper focus." (Decision of the Board, App. *infra* at 25a). This is a distinction without a difference.

C. DECISIONS OF THE CIRCUIT COURTS OF APPEAL

The courts of appeal are divided on use of statements that constitute protected speech.

² Their comments are contained in the appendix, *infra*, at 56a, 57a and 58a.

1. Circuits Which Permit Use Of Protected Speech As Evidence.

Among the earlier decisions to hold that free speech may be used as "background evidence" is *Hendrix Manufacturing Co. v. NLRB*, 321 F.2d 100, 103 (5th Cir. 1963) (*Hendrix*). The *Hendrix* Court first acknowledged that the company had the "legal right" to oppose the union:

As was its legal right, *NLRB v. McGahey*, 233 F.2d 406, 409 (5th Cir. 1956), the Employer made no bones about its opposition to the Union. . . . It was neither charged nor found that the speech, as such, was a violation of the Act. The Board, with ample justification did regard this as an emphatic statement of anti-union attitude. In this sense it is properly "background" against which to measure statements, conduct, and the like made by spokesmen, especially in terms of the interpretation which the employees reasonably could put on such actions. More specifically, this would bear on the question whether, from the listeners' point of view, these statements by subordinate management constituted forbidden coercion, threats or intimidation. (*Id.* at 103-104).

The court then attempted to explain in a footnote how the Board could use the protected free speech:

We do not regard this as a left-handed finding that Trippe's statement was illegal. Cf. *NLRB v. Colvert Dairy Products Co.*, 10th Cir. 1963, 317 F.2d 44.

Of course the purpose of the speech, as was quite proper, was to state management's reasons why a union was not needed and why it hoped the employees would vote it down. It was, therefore, anti-union. But it was legally anti-union. (*Id.* at 104, n. 6).

The Fifth Circuit again permitted the Board to use protected free speech in *NLRB v. Builders Supply Co. of Houston*, 410 F.2d 606, 608 (5th Cir. 1969), as background "against which to examine these (other) statements and conduct which were in fact found to be unlawful." *Id.* at 608. See also : *NLRB v. Colonial Lincoln Mercury Sales, Inc.*, 485 F.2d

455, 456 (5th Cir. 1973) and *NLRB v. Birdsall Construction Co.*, 487 F.2d 288, 291 (5th Cir. 1973).

In *Orchard Corp. of America v. NLRB*, 408 F.2d 341 (8th Cir. 1969), the court concluded that while the company had the right to campaign vigorously against the union, the employer's background of "strong anti-union posture" could be considered as "the overall background surrounding the parties lends substance to the Board's finding of violations. . . ." (*Id.* at 342).

Similar uses of protected speech as "background" have been permitted in the Fourth Circuit: *Darlington Manufacturing Co. v. NLRB*, 397 F.2d 760, 769 (4th Cir. 1968) (sanctioning the use of protected statements to draw background of controversy and to place other nonverbal acts in proper perspective), the Sixth Circuit: *NLRB v. Putnam Tool Co.*, 290 F.2d 663, 665 (6th Cir. 1961) (permitting the use of a four-year-old anti-union letter) and the District of Columbia Circuit: *United Auto Workers v. NLRB (Aero Corp.)*, 363 F.2d 702, 707 (D.C. Cir. 1966) (sanctioning the "limited use" of references to protected speech to place other nonverbal acts in "proper" perspective).

The First Circuit, although it has fluctuated on this issue, has also concluded that the protected "views" of supervisors "lend a significance to otherwise ambiguous events when the question is whether a given course of conduct is motivated by anti-union animus." *NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835, 840 (1st Cir. 1963), approved in *NLRB v. Wright Line, a Division of Wright Line, Inc.*, 662 F.2d 907, n. 14 (1st Cir. 1981), *cert denied*, 455 U.S. 989 (1982).

2. Circuits Which Do Not Permit Use Of Protected Speech As Evidence.

Other circuits concluded that the Board may *not* use statements protected by the First Amendment and Section 8(c). In *Coppus Engineering Corp. v. NLRB*, 240 F.2d 564, 571 (1st Cir. 1957) the First Circuit held, contrary to its holdings in *Lowell Sun* and *Wright Line*, *supra*, that, "an employer's statement cannot be used as background material for the finding of an unfair labor practice where such statement falls short of restraint or coercion."

The Third Circuit denied enforcement to the Board's order in *NLRB v. Rockwell Manufacturing Co. (DuBois Div.)*, 271 F.2d 109 (3d Cir. 1959), finding fault with the Board's use of protected free speech:

The Board's attempt to hoist by its own boot-straps, so to say, its findings that the statements were violative of the Act by reason of the respondent's hostility to the union as evidenced by the general manager's speech must be assessed in view of its holding that the speech was "privileged" and not violative of the Act. The Act (§ 8(c)) specifically provides that privileged communications "**** shall not **** be evidence of an unfair labor practice. * * *"

In an apparent split within a circuit, the Sixth Circuit, quoting the Legislative History of Taft-Hartley, found that it was impermissible for the Board's use of non-coercive letters. *Pittsburgh S.S. Co. v. NLRB*, 180 F.2d 731 (6th Cir. 1950):

With reference to the right of free speech the legislative history show that the amendment embodied in § 8(c) of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general cause of unfair labor conduct. *Id.* at 735)³

The Seventh Circuit, quoting *Pittsburgh S.S. Co., supra*, would not permit the Board to use non-coercive letters as background of union animus to support a finding that an employee was unlawfully terminated. *Indiana Metal Products Corp. v. NLRB*, 202 F.2d 613, 617 (7th Cir. 1953). See also: *Roper Corp. v. NLRB*, 712 F.2d 306, 311 (7th Cir. 1983) ("An employer is not required either to say something nice or say nothing at all about a union.")

The Eighth Circuit is also apparently split on the use of protected free speech as "background evidence". See *NLRB v. Howard Quarries, Inc.*, 362 F.2d 236, 239-40 (8th Cir. 1966) ("It is well established that otherwise legal acts cannot be the basis for an inference of anti-union animus."), *NLRB v. Arkansas Grain Corp.*, 392 F.2d 161, 165 (8th Cir. 1968) and *Gem International, Inc. v. NLRB*, 321 F.2d 626 (8th Cir. 1963) ("The speech made . . . to the employees lends no support to the

³ *Pittsburgh S.S. Co.* was affirmed by the U.S. Supreme Court, see: 340 U.S. 498, 501 (1951) in a companion case to *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The court agreed with the Sixth Circuit on other grounds that substantial evidence was lacking and therefore, expressed "no opinion on the possible effect of § 8(c) of the Taft-Hartley Act."

unfair labor practices charged.”).

Finally, the Tenth Circuit, in *NLRB v. Colvert Dairy Products Co.*, 317 F.2d 44 (10th Cir. 1963), held that it was a “specific error” to use protected free speech as evidence of an unlawful motive:

The campaign immediately preceding a Board election is usually such a situation and the Act provides both affirmative rights and prohibited acts governing the conduct of both management and union. Each is accorded the right of persuasion and denied the use of coercion. But it would be unrealistic indeed to expect management to use words of conviction in an effort to persuade an employee to vote against unionization without the presence of “anti-union animus.” In the matter of the election the management is, of course, anti-union. The union is equally anti-company. It is necessarily so. And hostility toward each other in such regard is not an unfair labor practice. The Act (sec. 8(c)) specifically provides that privileged communications between employer and employee shall not be evidence of an unfair labor practice. *To allow the privileged communications to become an instrument of destruction by indirection is to frustrate the right of free speech and the privilege of persuasion. Management cannot effectually attempt lawful persuasion if by so doing there is an ever-present penalty of “anti-union animus” for inherent in every campaign that is strenuously but lawfully waged is the expressed resistance to the views and claims of the opponent. The weakness of contra-position is often a premise of successful persuasion.*

In the case at bar the Board specifically acknowledges that the remarks of the general manager were privileged and lawful but nevertheless uses them as damaging background evidence in its consideration of the charges of violation of Sec. 8(a)(1). To do so, is, in the language of the Third Circuit, an “attempt to hoist by its own boots-traps, so to say, its own findings * * *.” *N. L. R. B. v. Rockwell Manufacturing Company*, 271 F.2d 109. The right of management to freely express its views in opposition to unionization

cannot be burdened by indirection and thus destroyed through technical rationalization. (317 F.2d at 46-47) (Emphasis supplied).

One court has suggested that there is a "vast difference between the use of protected statements as evidence of an unfair labor practice, and the use of such to draw the background of the controversy and place other nonverbal acts in proper perspective." *United Auto Workers v. NLRB*, *supra*, 363 F.2d at 707. Petitioner submits that there is no difference between the two uses. The court in *United Auto Workers* also concluded that a "limited use" of protected free speech is "sanctioned," suggesting, in effect, that a "limited" chilling effect on First Amendment expression is to be tolerated.

Since the decisions of this Court establish the First Amendment right of the employer to make statements which are anti-union in nature and the legislative history of Section 8(c) makes it clear that constitutionally protected communication must not be used as evidence, *even background evidence*, but the Board has indicated that it will continue to use protected free speech as "evidence of animus" and since the courts of appeal are roughly evenly split on this issue, the Court should grant this petition to resolve an important issue of constitutional law upon which the circuits are split.

The effect of this split is to frustrate the national labor policy as mandated by the Act. Thus, if an employer has two factories - one located in Michigan (6th Circuit) and one located in Wisconsin (7th Circuit), the same anti-union letter, which is conceded to be protected speech, could be used as background evidence of animus in Michigan and not used at all in Wisconsin. Whether an employer is found to have violated the Act should not depend upon which side of Lake Michigan the speaker is standing. This is especially so when First Amendment protected speech is at issue.

Our decision in *New York Times*, moreover, draws its force from the constitutional protection afforded free expression. The standards that set the scope of its principles cannot therefore be such that "the constitutional limits of free expression in the nation would vary with state lines."

Rosenblat v. Baer, 383 U.S. 75, 84 (1966), quoting: *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).

The severity of disagreement among the circuits on this issue

requires definitive resolution so that the First Amendment and Section 8(c) can offer the same protection nationwide.

II THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S FINDING THAT THE COMPANY WAS MOTIVATED BY ANTI-UNION ANIMUS.

This Court established the standard for review of the Board's decisions in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Thus, where a reviewing court "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view" it may set aside the Board's decision. 340 U.S. at 488.

Substantial evidence has been defined as, "more than a mere scintilla. It means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Substantial evidence also "must do more than create a suspicion of the existence of the fact to be established." *NLRB v. Columbia Enameling & Stamping Co.*, 306 U.S. 292 (1939).

If substantial evidence is lacking, the Court must reverse the Board. Where, as here, the evidence is based in part upon protected free speech the case should be remanded to the Board for a redetermination of the issues without the influence of the improper evidence. *NLRB v. Virginia Electric and Power Co.*, 314 U.S. 469, 479-80 (1941).

There are several key events which must be considered by this Court in making a determination as to whether there is substantial evidence to support its findings.

The Board found that the initial decisions to accept the Manpower written proposal was not motivated by anti-union animus and was limited to just the "merger" employees. The violation occurred, according to the Board, when the company, in response to union activity, "enlarged" the Manpower group to include all bindery workers. The undisputed facts make it quite clear that the Board's finding is not supported by substantial evidence.

The Manpower written proposal entered into on November 6 covered "bindery workers". The Board stipulated at the hearing that collator operators and helpers, the cutter trimmer operators, the mergers and the banders, were all classified as "bindery workers". The first day that bindery workers enrolled with Manpower was November 9. On that day Wayne Ford, a collator-helper (and not a "merger") was enrolled with Manpower as well. One of the Board's own witnesses

conceded that all bindery employees were required to enroll with Manpower and each of the employer's witnesses unequivocally stated that the decision was for all bindery employees.

The Board also found that Middle Earth had violated the Act by terminating two individuals because of their union activities. Again, these findings are not supported by substantial evidence.

In the case at bar, if the petition is granted, petitioner will be able to demonstrate in its brief, the lack of substantial evidence. Thus, where the Board's decision is not artificially imbalanced with the consideration of protected free speech as evidence of anti-union animus, it will become abundantly clear that reversal is justified.

CONCLUSION

This petition for writ of certiorari should be granted in order for this Court to firmly establish what evidentiary use may be made of protected free speech. Since the Board and the courts apparently recognize that protected (non-coercive) statements are free speech and cannot constitute, by themselves, unfair labor practices, yet readily admit such protected free speech as "evidence of animus", this Court should consider this petition. It is a recurring dilemma and a clear decision resurrecting the First Amendment and Section 8(c) of the Act is necessary. Petitioner respectfully submits that this case contains the necessary elements for such a decision.

Dated: October 2, 1989

By: Scott Merrill,
Counsel of Record

Diepenbrock, Wulff, Plant and Hannegan

APPENDIX A

No. 88-5269

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)	
)	ORDER
Petitioner,)	
)	
vs.)	
MIDDLE EARTH GRAPHICS, INCORPORATED,)	
Respondent.)	
<hr/>		

Filed July 6, 1989

BEFORE: NORRIS and RYAN, Circuit Judges; and ALLEN*,
United States District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

* Hon. Charles M. Allen sitting by designation from
the Western District of Kentucky.

APPENDIX B

NOT RECOMMENDED FOR PUBLICATION

88-5269

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,) ON PETITION FOR
) ENFORCEMENT OF
Petitioner,) AN ORDER OF
) THE NATIONAL
) LABOR RELATIONS
vs) BOARD
)
MIDDLE EARTH GRAPHICS,)
INCORPORATED,)
<u>Respondent.</u>)
)

Decided and Filed April 24, 1989.

BEFORE: RYAN and NORRIS, Circuit Judges, and ALLEN,
Senior District Judge*.

PER CURIAM. The National Labor Relations Board asks this court to enforce its unfair labor practice order against respondent, Middle Earth Graphics, Incorporated.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we conclude that the findings and order of the Board are in accordance with law and supported by substantial evidence, and that its order should be enforced.

Accordingly, for the reasons set forth in the order and in the decision of the Administrative Law Judge, the order of the board dated May 29, 1987 is enforced in all respects.

* The Honorable Charles M. Allen, Senior District Judge for the Western District of Kentucky, sitting by designation.

APPENDIX C
283 NLRB No. 156

MIDDLE EARTH GRAPHICS, INC.

and

JAMES CANNON, JR.

LIDELL FORD, JR.

WAYNE FORD

KAREN ROOT

CLARK OLSON

PATRICIA ANN COLE

GARRY WAYNE ROOT

LAMAR EDWARDS

UNITED PAPER WORKERS INTERNATIONAL UNION, AFL-CIO

Cases 7-CA-24013(1), 7-CA24019, Cases 7-CA24013(2),
7-CA24914(1), Cases 7-CA24013(3), 7-CA-24856(2), Cases
7-CA24030(1), 7-CA25033, Cases 7-CA24030(2), 7-CA24856(3),
7-CA24914(2), 7-CA24953, Case 7-CA24030(3), Case 7-CA24030(5),
Case 7-CA-24052, Case 7-CA24921

NATIONAL LABOR RELATIONS BOARD

May 19, 1987

DECISION AND ORDER

By Donald L. Dotson, Chairman; Wilford W. Johansen,
Member; Mary Miller Cracraft, Member

OPINION

On 6 June 1986 Administrative Law Judge Walter H. Maloney,
Jr. issued the attached decision. The respondent filed exceptions and
a supporting brief.

The National Labor Relations Board has delegated its author-
ity in this proceeding to a three-member panel.

The Board has considered the decision and the record in light
of the exceptions and brief and has decided to affirm the judge's

rulings, findings,¹ and conclusions and the adopt the recommended Order.²

We agree with the judge's finding that the Respondent failed to comply with the reinstatement provisions of the settlement agreement. In agreeing with the judge, we recognize that the Respondent experienced a significant reduction in orders for Cadaco game cards in 1985. The Respondent hired the discriminatees in May and June 1984 when its business was expanding dramatically because of the Cadaco contract. The employees were discharged in November 1984 and the settlement agreement was executed on 22 April 1985. By the summer of 1985, orders for Cadaco game cards had decreased, with a resulting decline in bindery work. Although the amount of bindery work available after the settlement agreement was substantially less than what existed in 1984, the record shows that the Respondent periodically produced game cards for Cadaco throughout 1985. The record further shows that on numerous occasions the Respondent bypassed the discriminatees and used employees with less seniority, including individuals referred by temporary employment services, to perform the Cadaco work. In view of this evidence, we find that the Respondent did not abide by the reinstatement provisions of the settlement agreement.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Middle Earth Graphics, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We further find totally without merit the Respondent's allegations of bias and prejudice on the part of the judge. On our full consideration of the record and the judge's decision, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence. We also find nothing improper in the judge's questions to the Respondent's witnesses.

² We correct the judge's inadvertent error in par. 2(b) of his recommended Order, under which the Respondent is to notify the employees in writing that the discharges and warning will not be used against them in any way.

APPENDIX D

JDD-154-86
Kalamazoo, Michigan

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MIDDLE EARTH GRAPHICS, INC

and

JAMES CANNON, JR., LIDELL FORD, JR.
WAYNE FORD, KAREN ROOT, CLARK OLSON,
PATRICIA ANN COLE, GARRY WAYNE ROOT,
and LAMAR EDWARDS, Individuals

and

UNITED PAPERWORKERS INTERNATIONAL
UNION, AFL-CIO-CLC

A. Bradley Howell, Esq., of Grand Rapids,
Michigan, and Richard F. Czubaj, Esq.,
of Detroit, Michigan, for the General Counsel.

Clare Annen, International Representative,
of Scotts, Michigan, for the Charging
Party (Union).

Francis T. Coleman, Esq., and Scott R. Merrill, Esq.,
of Washington, D.C., for the Respondent.

Case Nos.	GR-7-CA-24013(1)	GR-7-CA-24052
	GR-7-CA-24019	GR-7-CA-24856(2)
	GR-7-CA-24013(2)	GR-7-CA-24856(3)
	GR-7-CA-24013(3)	GR-7-CA-24914(2)
	GR-7-CA-24030(1)	GR-7-CA-24953
	GR-7-CA-24030(2)	GR-7-CA-24914(1)
	GR-7-CA-24030(3)	GR-7-CA-24921
	GR-7-CA-24030(5)	GR-7-CA-25033

DECISION

I. Findings of Fact

A. Statement of the Case

WALTER H. MALONEY, JR., Administrative Law Judge. The first nine of these consolidated cases initially came on for hearing before the undersigned on April 22, 1985, and all of them came on for hearing ultimately on January 28 thru February 5, 1986, at Kalamazoo, Michigan, upon consolidated complaints¹ issued by the Director of the Board's Seventh Region which allege that Respondent Middle Earth Graphics, Inc.,² violated Sections 8(a)(1), (3), and (4) of the Act and that it failed to comply with the provisions of a settlement agreement, thereby authorizing the Director to set aside the agreement and to prosecute earlier unfair labor practices ostensibly settled therein. More particularly, the Consolidated Complaint alleges that the Respondent repeatedly threatened employees with plant closing if they unionized, created the impression among employees that their union activities were the subject of company surveillance, threatened to fire employees if they joined a union, threatened to discharge employees and require them to become employees of a temporary employment referral service if they continued to discuss unionization, attempted to suborn perjury by an employee in a Board proceeding, coercively interrogated

¹. The principal docket entries in these consolidated cases are as follows: Charges filed herein by James Cannon, Jr., Lidel Ford, Jr., Wayne Ford, Karen Root, Clark Olson, Patricia Ann Cole, Garry Wayne Root, and Lamar Edwards, respectively, against Respondent Middle Earth Graphics, Inc., between November 13, 1984 and November 29, 1984, in Cases Nos. GR-7-CA-24013(1), 24019, 24013(2), 24013(3), 24030(1), 24030(2), 24030(3), 24030(5) and 24052; Consolidated Complaint issued by the Regional Director, Region 7, against the Respondent on December 31, 1984; Respondent's Answer filed on January 8, 1985; Hearing scheduled for Kalamazoo, Michigan, on April 22, 1985; Informal settlement agreement executed by all

². The Respondent admits, and I find, that it is a Michigan corporation which maintains its principal place of business in Kalamazoo, Michigan, where it is engaged in the commercial printing business. In the course and conduct of this business Respondent, during the preceding twelve months, sold and distributed from its Kalamazoo, Michigan, place of business, products valued in excess of \$100,000, of which products valued in excess of \$50,000 were shipped directly to points and places located outside the State of Michigan. Accordingly, Respondent is an employer engaged in commerce within the meaning of Sections 2(2), 2(6), and 2(7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

employees, threatened to fire employees who supported the union and to prevent them from receiving unemployment compensation, threatened an employee with reprisal upon returning to work if he engaged in union activities, issued disciplinary warnings to employees because they were union sympathizers, discharged James Cannon, Jr., Lidell Ford, Jr., Karen Root, Garry Wayne Root, Clark Olson, and Wayne Ford because of their union sympathies and activities, contracted out work in order to prevent unionization by removing union sympathizers from its payroll and placing them on the payroll of a temporary employment referral service, failed to recall Wayne Ford to work and discharged him because of his union sympathies and activities, harassed, demoted, and transferred Lidell Ford, Jr., upon his return to work because of his union sympathies and activities, and, since September, 1985, failed to recall Karen Root from layoff because of her union sympathies and activities. The Respondent denies the commission of any independent violations of Section 8(a)(1) of the Act, asserts that it discharged Lidell Ford, Jr., because he sabotaged company machinery, discharged James Cannon, Jr., because of his poor work performance, and discharged Garry Wayne Root, Karen Root, Clark Olson, and Wayne Ford because they refused to sign up with the temporary employment referral service that it had employed. It contends that it failed to recall employees because of lack of work and that Lidell Ford, Jr., was demoted upon his return to the job because he was unable to perform assigned work. The Respondent also contends that violations settled by an agreement concluded on April 22, 1985, are barred from prosecution by limitations. Upon these contentions the issues herein were joined.³

B. The Unfair Labor Practices Alleged

Respondent Middle Earth Graphics, Inc., is a small printing

charging parties, the General Counsel, and the Respondent and approved by the undersigned on April 22, 1985; Charges filed against the Respondent by Wayne Ford, Clark Olson, Lidell Ford, Jr., United Paperworkers International Union, AFL-CIO, CLC (herein called Union), and Karen Root, respectively, between August 2, 1985 and September 26, 1985, in Cases Nos. GR--7--CA--24856(2), 24856(3), 24914(2), 24953, 24914(1), 24921, and 25033; Consolidated Complaint issued against Respondent by Director, Region 7, on September 30, 1985, and First Amended Consolidated Complaint issued against Respondent by Director, Region 7, on October 30, 1985; Respondent's Answer filed on November 7, 1985; Hearing held in Kalamazoo, Michigan, on January 28 thru February 5, 1986; Briefs filed by the General Counsel and the Respondent with the undersigned on or before April 28, 1986.

³

The transcript herein is hereby corrected as follows:

1. On page 30, line 13, insert "Root" after "Karen"
2. On page 50, line 1, change "bet" to "get"

firm located on the north side of Kalamazoo, Michigan. It is owned and operated by Louis Hall, who founded the business about 12 years ago. Until the spring of 1984, it employed about 10-15 individuals and was engaged principally in handling small and medium-sized commercial printing jobs. In the spring of that year, it obtained a contract from a Chicago firm, Great Cadaco Games, a Division of Rapid Mounting & Finishing Co. (Cadaco), to produce sets of question-and-answer cards used in a game modeled after Trivial Pursuits. The Cadaco game is known as "Bible Trivia." Subsequent orders received from Cadaco included printing of question-and-answer cards for two similar games, "Children's Bible Trivia" and "Catholic Trivia." Taking on these orders meant a rapid increase in the staffing of the Respondent's plant, particularly in unskilled employees in the bindery who performed such functions as merging, collating, and banding. The discriminatees involved in this case were hired in May or June of 1984 when this upsurge in business began. Concurrently with the increase in staff, the plant began to operate on weekends and occasionally on an around-the-clock basis during the regular workweek. The initial Cadaco order was only for 25,000 sets of "Bible Trivia" cards, but, as that order was filled, other orders followed rapidly. Respondent continues to produce Cadaco game cards but not at the hectic pace it experienced in 1984. At the same point in 1984 Hall began to enlarge the physical facilities of his plant and to acquire new machinery for his expanded operation.

The bindery operation involves the cutting of large "signatures" or printed sheets into quarters, collating them on a nine-sheet collator, merging these collated sheets into larger bundles by what is, in effect, a hand-collating process, cutting or "trimming" the newly formed bundles of question-and-answer sheets into individual game sets, and then putting rubber bands around individual sets before they are boxed for shipment. In this operation, Lidell Ford, Jr., operated a collator (sometimes called a Harris multi-stitcher); James Cannon, Jr., was a merger; Karen Root was a bander; Lidell Ford's brother, Wayne Ford, worked as a merger and collator helper; and Karen Root's brother, Clark Olson, was a bander. Karen Root's husband, Garry Root, had a semi-skilled job as trimmer operator.

In June, 1984, shortly after they had been hired, Garry and Karen Root were carrying on a conversation in the office with Hall. Hall had been talking with Jim English, a salesman from another print shop, Kalamazoo Label, and was repeating to the Roots what the salesman had said. Hall noted that Kalamazoo Label was running at about 1/3 capacity because of union work rules and a

high union scale. Karen Root asked Hall what would happen if a union came into Middle Earth Graphics. Hall replied that a union would never "get in here. I will close my doors before I will let a union in here."

Sometime in May or June, Lidell Ford was working with Hall at the collator and asked Hall if he would ever have a union in the shop. Hall replied that he would "close the g.d. doors" before he would permit a union to come into the shop. Ford had a similar conversation at this same point in time with Chalker. Chalker expressed the opinion that Hall would close the plant before he would permit it to become unionized.

During the summer of 1984, Wayne Ford was engaged in a conversation with Foreman Don Antolovich and fellow employee Mike Ibeck at Antolovich's home. Ford observed that, if the plant were unionized, the Company would stop a lot of activities which Ford objected to, such as twelve-hour workdays and cutting incentive rates. Antolovich replied that a union would be nice but there was "no chance of it."

Early in the fall, Mrs. Root became upset by an incident at the plant involving her son, employee Steve Kilburn. Kilburn was attacked by a dog which had been tied up behind the plant and had been allowed to stay there for plant security reasons. Kilburn was not injured but had been frightened by the dog's aggressive behavior. Upon learning of this incident, Mrs. Root complained to the Plant Manager, Keith Tap, and the General Foreman, Rod Chalker, but received a rebuff. Upon returning to her job station, she angrily shouted to employees in the merging area of the plant, "Like hell we don't need a union." Antolovich was present when these remarks were made.

Shortly thereafter, Mrs. Root phoned the office of the United Paperworkers Union and sought information on how to go about organizing a union at the Respondent's plant. She did not follow up immediately on this information but, along with other employees, began to discuss the possibility of unionization. Much of this talk took place at the merging line. On one occasion, Antolovich told employees on the merging line that the Respondent was keeping a complete file on who talked union at the plant.

On Friday, November 2, 1984, the Respondent staged an open house at the plant. Respondent had just completed an addition to the company premises, and this milestone provided the occasion for the celebration. Customers, friends, and public offi-

cials were invited to view the enlarged building, see the plant in actual operation, and join Hall and others for a light lunch and a ceremonial ribbon cutting. A humorous program booklet, prepared and distributed for the open house, was introduced into evidence. Among the visitors was Patrick Allgood, the Regional Manager for Manpower, a supplier of temporary help. Allgood suggested to Hall that Manpower could be of help in providing him with extra help during peak periods, and Hall was amenable to the suggestion. He told Allgood to prepare a specific proposal and present it.

The following Tuesday, November 2, Allgood visited Hall and presented a written proposal. The document in question appears to have been derived from a word processor, with individual name changes on the cover and an individual quotation of a rate for temporary help at \$4.92 an hour. This figure represented the charge by Manpower to Middle Earth Graphics. While the proposal did not say so, record evidence indicated that this figure presumed an actual payout rate to employees of about \$3.50 or \$3.75 an hour. The balance represented deductions and supplements for withholding and insurance, payroll computations, and Manpower's profit. It became clear that Hall had in mind not merely procuring additional help from Manpower but was interested in placing a number of his current employees on Manpower's payroll, thus treating them as temporary help. Hall insisted to Allgood that none of the employees he wished transferred from the Middle Earth Graphics payroll to the Manpower payroll should experience reductions in their hourly rate, although it is clear that eventually all of them lost benefits, inasmuch as they were covered by a health insurance program as Respondent's employees while Manpower had no such program for the temporary help it supplies. Both Hall and his management employees were quite evasive about the actual hourly rate they were being called upon to pay to Manpower in order to maintain a \$4.00 payout rate to current employees. Eventually, another Manpower representative, Debra Kuhn, who assisted in the implementation of Manpower's contract with the Respondent, testified that, for employees earning \$4.00 per hour, Manpower charged the Respondent \$5.65 per hour for existing employees being transferred to its payroll and \$5.88 for new employees supplied from Manpower sources. Billing records and invoices in evidence confirm this testimony. The differential in rates represented Manpower's recruiting costs. Higher rated employees were billed at other amounts. Miss Kuhn testified that the Manpower markup was from 17%-30%, although a simple arithmetic calculation makes it clear that the Manpower markup on the \$4.00-an-hour employees was about 41%.

On the afternoon of Wednesday, November 7, Greg Henderson, a representative of Manpower, talked to the mergers in the merging area about signing up for Manpower. Both Chalker and Antolovich were present. There was some objection from Respondent's employees to the idea of leaving the Respondent's payroll and transferring to Manpower. The objections centered on the fear of losing their jobs and of receiving cuts in pay. As the discussion drew to a close, Lidell Ford, who was not a merger but who happened to be in the area, told the assembled mergers that, if they signed up for Manpower, their action would be tantamount to quitting Middle Earth Graphics and they would have no standing to organize a union among the Respondent's employees. Antolovich admits reporting this or similar statements on the part of L. Ford to Hall.⁴

On the evening of the same day, Ford phoned Clare Annen, the Union's representative in the Kalamazoo area, told him what was happening at Middle Earth Graphics among the mergers, and arranged for Annen to meet with interested employees at Ford's home on Saturday, November 10. On the morning of Thursday, November 8, Hall summoned Ford to his office. In the course of a private interview, Hall told Ford that he was in possession of written proof that Ford had wilfully damaged the Respondent's collating machine and proceeded to fire Ford for doing so. Ford denied the accusation and asked to see the statements that Hall had referred to. He also asked Hall to produce the second-shift employees who had made the written allegations. Hall declined and said they would be given to him with his final paycheck. Ford protested this action and claimed he could run the collator better than any two employees. He told Hall to "cut out the bullshit" and accused Hall of using him as a scapegoat. Hall's only response was that nobody would run the Company but Hall himself. When Ford picked up his paycheck the following day, he asked Comptroller Joseph Hagenbarth for the statements and Hagenbarth refused to produce them upon advice of counsel. No such statements have ever been

⁴ Although there is some confusion in the record concerning the sequence of events which surrounded the appears, as detailed later, that damage had been done to a collator the previous afternoon or evening, which the Respondent attributed to Ford. Ford was discharged for this infraction on November 8, the morning following his statement to the mergers recited above.

furnished, even in response to the General Counsel's subpoena. I conclude that they never existed in the first place.⁵

During the next few days, several supervisors made statements to various employees indicating that only mergers would be required to sign up for Manpower. On Friday, November 9, Chalker spoke to several employees, including Garry Root, near the trimmer and indicated to them that Manpower was only for mergers, explaining that mergers were part-time employees and that the Respondent was taking this action because it was not sure how long orders for Cadaco games would last so it wanted to be sure that the mergers had some alternative source of employment if the Cadaco contract ran out. Later on in the day, Garry Root spoke to Antolovich and asked him if Manpower was just for mergers. Antolovich assured him that this was so. On the same day, Patricia Ann Cole, a merger, came to the plant to pick up her paycheck. She spoke to Antolovich and asked him if she had to join Manpower. He told her that she would have to sign up and stated that this requirement applied only to mergers because they were regarded as part-time employees. Chalker had also told Clark Olson that only the mergers were being required to transfer to the Manpower payroll.

Debra L. Schrock worked as a collator helper on the evening shift.⁶ On November 9, she asked Chalker if she had to sign up for Manpower. Chalker's reply was, "Not as long as you don't talk union." Later on in the following week, Tap asked Mrs. Schrock if she had signed up for Manpower. Her reply was that Chalker told her she did not have to sign up so long as she did not talk about

⁵ Respondent's second-shift employees, Mihally Csiszar and Mrs. Schrock, gave diametrically opposed statements concerning making written statements on November 11. Csiszar, who is Hungarian and has trouble writing English, testified that he and Mrs. Schrock prepared a joint statement in their own handwriting upon being questioned by management about vandalism performed on the collator and turned the statement over to their supervisor. Mrs. Schrock testified that she prepared no such statement and, in fact, was never interviewed by management concerning the events of November 6 until, on November 14, she and Csiszar were presented with a typewritten statement, dated November 12, detailing the damage done to the collator and accusing Ford by necessary implication of doing the damage. She insisted that the statement be modified before she would sign it and it was changed. This statement, signed both by her and by Csiszar, is in evidence. At the hearing in this case, Hall admitted that he had been "mistaken" when he said that he had statements in his possession alleging Ford's responsibility for vandalism before Ford was fired.

⁶ At a much later point in time Mrs. Schrock became a merger.

"onions." She used the word "onions" to avoid mentioning the forbidden term "union." Tap told her at that time that everyone had to sign up, so she did the following day.

The mergers worked on Saturday, November 10. During the course of this workday, Mrs. Cole made the observation to her fellow employees and to Antolovich that the only reason the Company was bringing in Manpower was because of union organizing activity. Antolovich's reply was that, if there was any further mention of unions, employees would be laid off permanently and the plant doors would be closed. Antolovich admitted making this statement but explained for the record that he was just expressing his opinion. He also stated for the record that Hall was the "kind of guy who will cut off his nose to spite his face" and ventured the statement that "if he doesn't get his way, nobody will."

A union meeting took place the same evening at Lidell Ford's home. Among those who attended were the Roots, Olson, Cannon, and Wayne Ford. As noted previously, Ford had been discharged by this time. Among the questions discussed was whether employees should obey a directive to sign up for Manpower. Annen replied that it was up to each employee as to whether he or she signed up, and each employee would have to make this judgment on the basis of what he could afford to do if faced with discharge. Annen expressed an opinion that it was an unfair labor practice for an employer to force employees off its payroll and felt it would be appropriate to file a charge. He did not state that he felt that employees who signed would be disenfranchised from participating in a representation election. Union authorization cards were distributed on this occasion and every employee who attended signed a card.

At or about this same time, Antolovich met Mrs. Cole at a friend's house. I credit her testimony to the effect that Antolovich told her that the Company was trying to make a case against Lidell Ford and asked her how she would like to make \$25? She flippantly replied, "What do I have to do - kill someone?" Antolovich told her that all she would have to do was to go into court and say she saw Ford tampering with machinery. Mrs. Cole objected, saying that she did not know anything about the machinery. Antolovich replied that she could just say that she saw him tampering with valves and hoses. Mrs. Cole refused, insisting that she would not lie either for or against Ford.

On Monday, November 12, Respondent's supervisors, including Hall, and Manpower representatives Allkins and Kuhn,

met with all shop employees. At this time Hall announced that all employees, except for "the original ten", would be required to transfer from the Middle Earth Graphics payroll to the Manpower payroll. The "original ten" was Hall's way of describing the employees who had been working for him before the work force expansion took place in spring of 1984. This number included the pressmen, all supervisors and the office staff. The Manpower representatives were asked a series of questions about seniority and other matters. They answered some questions and were unable to answer others. Hall was asked why this was taking place and his only answer was, "No comment." Cole and Cannon then stated aloud that the only reason the transfer to Manpower was taking place was because of the union. Hall said it was taking place so that he could protect himself from what Lidell Ford had done the preceding week.

Later on that day in a private conversation, Mrs. Cole asked Hall what would happen if she refused to sign up for Manpower. He replied that she would be fired. She said that she did not want to become a "rent-a-jerk." Hall told her that he did not care if a union did come into the plant, observing that he had enough money and could quit and close the doors. After consulting with her husband, Mrs. Cole resigned.

On the following day Cannon was terminated just after he reported for work. When Antolovich gave him the news his reply was, "I knew it was coming." Antolovich told Cannon that he found a number of mistakes in Cannon's work the day before. Cannon argued that Antolovich was in no position to complain about Cannon's work when Antolovich's brother, Walter, also a merger, was "goofing off." Antolovich said that he would divide up the mistakes which had been found between Cannon and his brother. However, Walter Antolovich was not disciplined.

On Wednesday, November 14, a third meeting was held between a Manpower representative and the production and maintenance employees. Miss Kuhn represented Manpower on this occasion. She attempted to answer employee questions which had been left unanswered during previous meetings. Thereafter, she conducted private interviews at which time she solicited applications from those who were being required to transfer.

On November 14, Tap called Garry Root into his office and asked Root if he had heard about any union activities. Root replied that he had talked to someone about the union the previous week. Tap asked Root whom he had talked with, but Root refused to

answer. Tap went on to ask Root if he had seen any union cards. Root replied untruthfully that he had not seen any.

At or about this same point in time, Tap had a conversation with Lamar Edwards, the janitor and maintenance man. He asked Edwards if Edwards had signed for the union. Edwards replied that he had not done so. Tap then asked Edwards if Edwards had received a union card from Garry Root. Edwards had in fact received a union card from Garry Root. After engaging in a conversation with another employee named Dove, Edwards showed the card to Tap. Tap asked if he could make a copy of the card and Edwards consented. Tap then asked Edwards if Garry Root had signed him up on the Company property. Edwards replied that Root had come to his house and signed him up there. Tap then told Edwards that Garry Root had "lied to save his own ass" because Root had told Tap something else. He then instructed Edwards to return to the merging line.

On the morning of Thursday, November 15, both Root and Olson came to work wearing union buttons. They had attended a union meeting the night before and presumably had obtained the buttons at the meeting. Hagenbarth asked them when they arrived whether they had signed up for Manpower. All three replied that they had not done so. Hagenbarth told them that, if they had not signed with Manpower, they would have to leave the plant. Garry Root replied that he did not work for Manpower, "I work for Middle Earth Graphics." Hagenbarth told Root that he could not give him his check until he signed for Manpower. Root told Hagenbarth to get someone with authority.

Mrs. Root went to her job and began to work. Some of her fellow employees asked her if she had signed up for Manpower. She replied that she had not done so and that she was not going to do so because she was trying to get a union into the plant. Not long thereafter, Mrs. Root heard Antolovich report this conversation to Hall in Hall's office. Antolovich told Hall, "You've got to do something. Those people are downtalking Manpower and talking union. We've got to get them out of there."

Before long, Hall, Tap and Antolovich came into the bindery and went up to Garry Root. Hall asked Root if he had signed up for Manpower. Root said that he had not done so, adding that he was working to get a union into the plant. Hall stepped toward Root, backed him into a machine, and called him an s.o.b. Root said tauntingly that Hall would love to have an excuse to hit him. Hall replied that he knew a hundred people in Kalamazoo who would

like to hurt Root. Hall then instructed Tap to call the police. Shortly thereafter, they arrived. Hall pointed to both Root and Olson and asked the police to remove them. As the police began to do so, Mrs. Root asked one of the officers why she was being required to leave and he replied, "Trespassing." She objected, telling the office that she had punched in and was just doing her job. Hall insisted that she be removed as well and she was.

Wayne Ford had originally signed an application for Manpower but then withdrew it on November 16 by calling the Manpower office. On November 19 when he went to work, Tap asked him if he had signed for Manpower. W. Ford replied that he had done so but had withdrawn his application. Tap then told him that "we no longer need you", whereupon W. Ford left the plant. Manpower's invoices for the first two weeks of its contract with the Respondent indicate that it supplied the Respondent with 11 newly-recruited employees during this period — Lynne M. Alston, Sheila A. Forney, James A. Feringa, Marilyn J. Hosteller, Michael J. Stanfill, Gerald L. Stump, Veronica D. Swift, Deborah E. Talley, Cheryl A. Heighton, Julie K. Kimball, and Jerome W. Phelps. They also indicate that 19 former Middle Earth Graphics employees were transferred to the Manpower payroll — Walter Antolovich, James H. Butler, Dale E. Croy, Houston B. Ford, Bonnie K. Garton, Mary Ann Hollis, Michael J. Ibach, Scott R. Kellogg, Lamar Edwards, Mytris McCants, Ricardo Nunn, Margaret A. Ross, Debra L. Schrock, Calvin C. Shafer, Jr., Brenda K. Van Tilberg, Charles J. Deneau, Tamara Stickney, Janet M. Van Tilberg, and Phyllis J. Narlock.

Between November 13 and November 29, the first series of unfair labor practice charges in this dispute were filed. On November 21, the union filed a representation petition seeking to represent the Respondent's production and maintenance employees. That petition is still pending, having been blocked by the outstanding unfair labor practice charges against the Respondent.

Lidell Ford's brother Houston Ford continued to work at the Respondent's plant on the Manpower payroll. Sometime later in November, Hall spoke with H. Ford about his brother's discharge. He told H. Ford that he hated to fire Lidell but that Lidell had been harassing employees and had tampered with the collator, so that others who worked on the machine were prevented from operating it to full capacity and making their full piecework incentive rate. Hall added that Lidell was trying to bring a union into the plant, and there was "no way in hell" that he would permit a union to come into the company.

Hall also had a private conversation with Lamar Edwards in late November, in the course of which he told Edwards that he did not want to give anyone any trouble and he did not want anyone to give him any trouble. His words were that if someone gave him trouble, "he would give it to him back", mentioning that he had an employee who was a real troublemaker. Shortly thereafter, Hall told Edwards that he would be laid off for lack of work. Edwards said that he would quit and apply for unemployment compensation.

The original consolidated unfair labor practice complaint was issued by the Regional Director on December 31, 1984. The case was set for hearing on April 22, 1985. On that date, the parties executed an informal settlement agreement, which included an undertaking on the part of the Respondent to pay specified sums of money to both Roots, Olson, Wayne Ford, Lidell Ford, and Cannon in settlement of the outstanding complaint. It also obligated the Respondent to offer these six individuals "full and immediate reinstatement to their former jobs without prejudice to their seniority or other rights and privileges previously enjoyed" and to cease and desist from committing further unfair labor practices.

There is no dispute that the Respondent paid to the six discriminatees the sums required under the settlement agreement or that it posted the required notice. At issue herein is whether the Respondent offered these individuals full and immediate reinstatement to their former jobs and whether it refrained from committing further unfair labor practices. Of the six discriminatees who were parties to the April 22 agreement, only three ever worked for the Respondent thereafter. Two did not begin to work until June 28 and the third did not start back to work until August 19. Neither was working when the case came on for hearing again on January 28, 1986.

On May 9, 1985, Hall wrote identical letters to all six discriminatees who were involved in the settlement agreement. The letter read:

Pursuant to the terms of the settlement agreement entered into between Middle Earth Graphics, Inc., and the National Labor Relations Board, on April 22, 1985, you are hereby notified that you are reinstated to your former position as an employee and any reference to your discharge and/or layoff has been removed from your file.

Due to lack of production requirements, there is no work available for you at this time. However, you will be given the normal notice when that does occur. Therefore, you should keep us advised of your current address.

During this same period in time, the Respondent transferred nine former employees whom it was continuing to utilize on the Manpower payroll back to their former status as Middle Earth Graphics employees. These included Ann Ross, Charles Deneau, Beth Breed, Debra Schrock, James Butler, Scott Kellogg, Bonnie Garton, Calvin Schaeffer, and Brenda Van Tilberg. Some resumed their places on the Middle Earth Graphics payroll on or before June 26, 1985, when the first two discriminatees came back to the plant. All were back by August 19 when the third discriminatee returned. Chalker explained that he had been told by Hagenbarth that it was more expensive to maintain these individuals on the Manpower payroll, with the attendant markup for Manpower's services, than to employ them directly as Middle Earth Graphics employees. Hagenbarth testified that the anticipated savings in administrative costs in the preparation of payrolls did not materialize. Hall was asked why he transferred these individuals from the Respondent's payroll to Manpower and then back again. He said that he assumed that it was for a reason other than cost effectiveness but he could not quite recall what that reason was.⁷ Nobody explained why it took the Respondent over six months to come to the conclusion that it was costing more to employ former employees on the Manpower payroll than it cost to hire them directly.

Mrs. Root was recalled on June 28 to her position as a bander. She was laid off again on July 2. She was recalled a second time on July 30 and worked about two weeks, when she took sick leave. She returned again on August 20 and worked until September 20, when she was laid off ostensibly for lack of work. She has not worked since that time.⁸

⁷ Hall had a very selective memory and professed absence of recollection on crucial matters relating to events in this case. He also was evasive in the answers he did give. I note also his profane outburst during the hearing, the fact that he was photographing witnesses in the hallway outside the hearing room as they sat waiting to testify, and that he was coaching a company witness in the hallway, prior to her testimony, notwithstanding the existence of a sequestration order. In short, his partisanship at trial was unrestrained and out of control. I discredit his testimony.

⁸ Mrs. Root testified that, during this period of her employment, she wore a union button to work.

Late in July when Mrs. Root was notified a second time to report for work, her brother, Clark Olson, was at her home. Upon learning of his sister's recall, Olson phoned Chalker and asked him if he should come back to work as well. Chalker informed Olson that there was no work for him and that there would be no work for him in the near future. On or about August 9, an office employee, identified only as Brenda, phoned Mrs. Root's home and asked for Olson. He was not there. Upon receiving this information, Olson phoned Chalker, who informed him that he had to keep the office updated as to his current phone number. Olson told Chalker that he had the correct phone number. Chalker said nothing about Olson's reporting for work. He admitted at the hearing that he had no work for Olson at that time. Shortly thereafter, Olson received a letter, dated August 10 and signed by Hall, in which Hall simply noted that Company records indicated that Olson's phone number was the same as his sister's number and reminded Olson that it was his responsibility to keep the Respondent informed as to any change in his address or phone number. It said nothing about reporting for work. A few days later, Olson received a letter from Hall, dated August 20, informing him that he was being discharged, effective August 20, for his failure to report to work on August 19.⁹ Olson insisted at the hearing that he never received any letter or other communication instructing him to report for work on August 19 or any other date. Respondent insists that it mailed Olson such a letter a few days before this date. While the Respondent was able to produce copies of other similar correspondence with its employees, it failed, in response to a subpoena by the General Counsel, to produce a copy of the disputed notification letter to Olson. I conclude that no such letter ever existed or was ever sent.

On June 24, 1985, Csiszar, who by this time had become a supervisor, phoned the Root house for the purpose of requesting Garry Root to return to work. He spoke with Mrs. Root. Upon learning of the call, Garry Root returned it and was told by Csiszar that there was work available on a six-hour-a-day basis and requested Root to report the following morning. Root said he could not do so, since he was working for Merchant's Publishing Company and would be obligated to give them two weeks' notice. Csiszar informed Root that the job in question would last only two weeks. Hall testified that Root was only being offered a couple of days' work. Root told Csiszar that he would have to have two weeks' notice of any offer to return and further informed Csiszar he

⁹ Chalker stated at the hearing that he had only a day or two of work for Olson on August 19 and that the purported offer was for temporary work.

would not come back to work for the Respondent on a six-hour-a-day basis since he regarded such a job as part-time. On the following day, Garry Root received a letter from Hall, in which Hall stated:

This letter is confirming the telephone conversation Mike Csiszar had with your wife Karen on Monday, June 24. You were advised to report to work on Tuesday, June 25, 1985, no later than 8:00 a.m.

Root did not report for work on June 25. Instead, he wrote Hall a letter on that date which stated:

This letter is to acknowledge my conversation that I had with Mr. Csiszar late in the afternoon of June 24, 1985.

As you are aware, I am presently employed and it is my contention that less than twenty-four hours notice to return to work is less than adequate.

As stated in the settlement agreement, I am to be reinstated to my former position with benefits as a full-time employee. Mr. Csiszar informed me that his offer was for a six-hour shift which is less than full time, and consequently without benefits.

Therefore, I am advising you that at this time your offer is unsuitable and does not constitute compliance with the settlement agreement. However, if and when a position of fulltime employment does open, I would expect to be properly notified within (sic) a timely fashion.

Root has heard nothing from the Respondent since that time.

On June 26, 1985, Hall sent a certified letter to Cannon instructing him to report to work no later than Friday morning, June 28, at 8 a.m. The letter was sent to Cannon at 207 Alamo Hills, Kalamazoo. At that time Cannon had temporarily moved back to his parents' home in Grand Rapids in order to assist in caring for his father, who was ill. When Cannon eventually received the letter, he phoned the shop and spoke to a secretary identified only as Sandy. He asked to speak with Hall and with other supervisors. He was told by Sandy that they were busy and could not speak with him.

This is the last communication that he has received from the Respondent.

A letter, dated June 26, was sent by the Respondent to Wayne Ford instructing him to report for work on June 28 no later than 8 a.m. W. Ford did so and was assigned to run the collator. Later that day, Chalker moved him to the merging line. W. Ford was employed as a collator operator before his discharge. This was an incentive job on which he was able to earn about \$7 an hour, including the piecework rate which was attached to it. However, a merging job pays a straight \$4 an hour, without incentive. W. Ford worked as a merger until July 2 when he was laid off. At that time he asked Antolovich when he would be recalled. Antolovich told him that he would give him a call or stop by his apartment to inform him when work would again be available.

W. Ford heard nothing more from the Respondent for nearly a month, so he went to the plant and spoke with Chalker. Chalker told him at this time that, in order to come back to work, he would have to have a phone so that he could be notified at short notice that work would be available. Ford pressed Chalker to learn when work would be available. Chalker's only reply was to let him know when he had a phone installed in his apartment because he did not want to have to go through third parties in order to call him back to work. On August 9, W. Ford received the following letter from Hall:

Rod Chalker called your phone number on August 7, 1985, that you have given us to call. He received a recording stating that the number had been disconnected.

The scheduling of the work that you qualified for does not allow the time to notify you by mail.

It is your responsibility, as an employee, to inform Middle Earth Graphics, Inc. of any changes of your address and/or phone number.

Respondent sent W. Ford another letter, dated August 13 and signed by Hall. It read:

This letter is to confirm Rod Chalkers [sic] instruction of August 12 when you came into the shop, that we need a phone number to reach you when there is work.

Our work load does not permit the time to notify people by letter.

If we do not hear from you by Monday the 19th, we will assume that you do not want to work here.

On Monday, August 19, at about 3:50 a.m., Chalker gave W. Ford a call from his home. Chalker had just returned from a social engagement and, before going to sleep, attempted to contact W. Ford to tell him to come to work that morning. Chalker reached a neighbor of Ford who lived in a downstairs apartment. He told the neighbor that he was Ford's boss and wanted to speak with him. The neighbor went upstairs, knocked on the door of Ford's apartment, and awakened him to relay this message. Meanwhile, Chalker was placed on hold. By the time that Ford had dressed and had come downstairs to take the phone call, Chalker had hung up without disclosing to anyone the substance of what he wanted to say to Ford. Ford went back to bed. The next day, Ford received a letter, dated August 20 and signed by Hall, which stated:

This is to inform you that your failure to report to work by Monday, August 19, 1985, results in the termination of your employment Middle Earth Graphics (sic) as of August 20, 1985.

Chalker stated in his testimony that he had only one to three days' work available for W. Ford at that time.

In mid-July, Lidell Ford complained to the Board agent who was supervising compliance with the settlement agreement that he had not been recalled to work. On August 1, 1985, Production Manager Douglas B. Harris wrote L. Ford a letter, which stated as follows:

This letter is to inform you that as of August 1, 1985, Middle Earth Graphics is giving you a two week notice to report to work.

There is presently work available for you. If you desire work, please let us know immediately and report to work no later than 7:30 a.m. August 19, 1985.

Shortly after receiving this letter L. Ford called the plant and spoke with Chalker. He told Chalker that he would like to come back to work on August 12 but was not sure that he could make it by that date because he was having car trouble and wanted to get his car

repaired before starting work. He also told Chalker that, if he could not make it by August 12, he would certainly be back to work by the 19th. Chalker told him that he should simply call the plant during business hours and let the Company know the date on which he would actually return. Ford then asked Chalker if he would experience any trouble after he came back. Chalker replied that he would have no trouble "as long as (he) did his work, kept (his) nose clean, and didn't talk union." On or about August 15, Ford called the plant, talked to a clerical employee named Brenda, and told her that he would be in on August 19 at 7:30 a.m.

When Ford reported for work on August 19, Chalker told him to go to work on the collator he had used before being discharged but instructed him to set it up in the stitcher mode for a practice run. While operating this machine (sometimes called a Harris multibinder) in 1984, Ford had used it only for collating pages of the Cadaco games into sets of nine. With the addition of different accessories, the multibinder can also be used to fold pages of printed material and to stitch or staple the folded pages together into booklets. To operate the machine in a stitcher mode, it is necessary to attach the stitcher head, insert a spool of wire used for stitching, attach different receiving trays, and make various adjustments in order to permit the machine to perform these facets of the operation in proper sequence. Timing is of critical importance in setting up the machine in the stitcher mode.

Ford had never before set up the machine in the stitcher mode, nor had he operated it as such. His familiarity with the machine was limited to its use as a collator. During the interim while the discriminatees were away, the Respondent had purchased a new collator which assembled packets of 10 pages rather than 9 pages, so it used its new collator for this purpose and relegated the older machine to occasional use as a stitcher. The only person employed by the Respondent who was skilled in setting it up and operating it in the stitcher mode was Csiszar. He was on vacation on August 19. Chalker was familiar with this aspect of the operation but did not regularly operate the machine for stitching.

Hall had instructed Chalker to assign Ford to the stitcher upon his return to the plant. Chalker admits that he had reason to believe that Ford would have difficulty in setting up the machine and in operating it in the stitcher mode. He was correct in his assumption. After working on the machine for several hours, Ford was unable to set it up and to get it into operation. He could not attach the collator to the stitcher. On several occasions, he asked Chalker for assistance in setting it up and each time Chalker refused

to help him, claiming that he was too busy with other matters. Ford asked for the machine manual and Chalker brought it to him, but Ford was unable to complete the set up work with the assistance of the manual. Two other employees, including Houston Ford, came over to help L. Ford on their lunch hour but Chalker told them to leave L. Ford alone.

By early afternoon, Ford still did not have the machine in operation and Chalker reported this fact to Hall.¹⁰ He told Hall that Ford could not set up the machine and was not getting out any production. Respondent then made up a written statement, dated August 20, 1985, which read:

I cannot set up and run the multibinder that Rod Chalker has asked me to set up and run.

There was a place following this statement for Ford's signature and the signature of a witness.

Chalker took the blank statement to Ford and asked him to sign it. Ford insisted that he could get the machine in operation and declined to do so. After Ford had worked unsuccessfully for another hour or so on the multibinder, Chalker again presented the paper for Ford's signature and insisted that he sign it. Ford did so but told Chalker that he was signing it under protest. Chalker then summoned Margaret Ann Ross to the machine and asked her to sign the statement as a witness.

At this time, Ford was reassigned to become a collator operator's helper. Chalker explained that this was the only other job available. In doing so, he took a cut in pay from \$5.50 to \$4.00 an hour, without incentive bonuses.¹¹ Ford continued to work at this job until September 20, when he was laid off, ostensibly for lack of work. He has not worked at the plant since that time.

¹⁰ There is no contention that Ford was malingering. Chalker testified that he felt that Ford was making his best effort to get the stitcher in operation.

¹¹ In addition to demoting Ford, Chalker then gave him a disciplinary write-up, which he dated August 13. The write-up stated:

Lidell called me at my mother's house on 8-3-85 and said that he would come to work on ... 8-12-85. He didn't call in a day later. He has had 2 verbal warnings before and 1 wk. suspension.

Action taken: 3rd verbal warning. Next action taken will be suspension and after that termination.

Analysis and Conclusions

In order for the Board to set aside the settlement agreement of April 22, 1985, it is necessary for it to find that the conduct of the Respondent following the execution of this agreement either violated specific undertakings set forth therein, or that the Respondent committed additional unfair labor practices, which, in general terms, it also agreed to avoid when it signed the settlement. As discussed in more detail, *infra*, the Respondent failed utterly in its obligation to offer the six discriminatees full and immediate reinstatement to their former or substantially equivalent positions. Moreover, the Respondent committed additional unfair labor practices which also vitiated any protection it might otherwise enjoy from prosecution for unfair labor practices committed before the settlement was signed. In order to treat the events in this record in approximate chronological sequence, the analysis of the record should begin with a consideration of the Respondent's pre-settlement conduct.

1. Evidence of Animus

Quite apart from any specific violations of the Act alleged and found in this case, the Respondent demonstrated clear evidence of animus which should be considered in placing the events described herein in proper focus. Among the documents in the record is a large multi-colored brochure which the Respondent has printed and circulated to advertise the capability of its new multi-color press. The document is a humorous elaboration of Hall's tongue-in-cheek proposal for a new 51st state, to be carved out of the existing state of Michigan and named Six-One-Six after the telephone area code for Western Michigan. Entitled "A New State. A New Start.", the brochure features Hall as its centerfold, dressed in regal attire and holding a sword and scepter. Also portrayed on this page are two cartoon figures, dressed as attendants from an insane asylum, who are chasing Hall and are making ready to apprehend him and place him in a straightjacket. Inside the brochure is a large map of Michigan. The eastern half is portrayed as a barren wasteland while the western half - State Six-One-Six - is shown as a flourishing, verdant paradise. At the center of State Six-One-Six is its capital, Kalamazoo. Access to Six-One-Six from Eastern Michigan is limited to a drawbridge over a moat. This feature is captioned:

Access to the State of Six-One-Six will be severely restricted. Drawbridges will be raised to keep out such undesirable elements as labor organizers, dead

beats, carpetbagging politicians, and itinerant lawyers.

When asked at the hearing if he was opposed to unions, Hall replied: "Just in Six-One-Six."

2. Independent Violations of Section 8(a)(1) of the Act

(a) When, in June of 1984, Hall told the Roots that a union would never come into the plant and that he would close the doors before letting a union come in, the Respondent violated Section 8(a)(1) of the Act.

(b) When, in late May or June of 1984, Hall told Lidell Ford that he would "close the g.d. doors" before he would permit a union to come into the shop, the Respondent violated Section 8(a)(1) of the Act.

(c) When, during the same period of time, Chalker told Lidell Ford that he felt that Hall would close the plant before he would permit it to become unionized, the Respondent violated Section 8(a)(1) of the Act.

(d) When, on November 9, Chalker told Debra Schrock that she did not have to sign up for Manpower if she did not talk union in the shop, the Respondent violated Section 8(a)(1) of the Act.

(e) When, on November 10, Antolovich told the mergers that any further talk of unionization would cause the Respondent to close the plant doors and lay off its employees permanently, the Respondent violated Section 8(a)(1) of the Act.

(f) When, on or about November 9, Antolovich solicited Patricia Ann Cole to commit perjury in order to support the Respondent's case against Lidell Ford, the Respondent violated Section 8(a)(1) of the Act.

(g) When, on November 14, Tap coercively interrogated Garry Root in his office as to whether Root had heard about any union activities, with whom he had discussed unionization, and whether he had seen any union cards, the Respondent violated Section 8(a)(1) of the Act.

(h) When, on or about November 14, Tap asked Edwards if he had signed a union card and when he asked Edwards if he could

duplicate a copy of a union card in Edwards' possession, the Respondent violated Section 8(a)(1) of the Act. When, in the course of the same conversation, Tap told Edwards that Garry Root had lied about Root's union activities "to save his ass", the Respondent further violated Section 8(a)(1) of the Act.

(i) When, in late November, Hall told Houston Ford that he had fired Ford's brother in part because he was trying to bring a union into the plant, and when he told H. Ford that there was "no way in hell" that a union would come into the plant, the Respondent violated Section 8(a)(1) of the Act.

(j) When, in August, 1985, Chalker told Lidell Ford in the course of a phone conversation that there would be no reprisals against Ford when he returned to the plant so long as Ford did his work, kept his nose clean, and did not talk union, the Respondent violated Section 8(a)(1) of the Act.

3. The Discharges of the Roots, both Fords, Olson, and Cannon in November, 1984

All six discriminatees named in the original Complaint and made parties to the Settlement Agreement were union supporters. Except for Lidell Ford, all had signed union cards before they were discharged. Mrs. Root was the original contact between the Respondent's employees and the Union. Ford had renewed this contact the night before he was discharged. All were discharged by an irascible and outspoken employer whose intense and implacable anti-union sentiments have been itemized and documented above.

All six were also known to the Respondent to be union sympathizers. Mrs. Root made known her views in September when, in the presence of Antolovich, she shouted angrily to other employees that they needed a union because she could obtain no redress of a grievance concerning the maintenance of [sic] watchdog behind the plant. Lidell Ford warned mergers on the afternoon of November 7 that they would forfeit their right to organize the Middle Earth Graphics plant if they became Manpower employees. His remarks were immediately reported to Hall. In a private conversation in the summer of 1984, Wayne Ford had made his pro-union sympathies known to Antolovich. Moreover, his close family relationship with Lidell certainly placed him under suspicion that he harbored the same sentiments which his brother expressed. Cannon voiced pro-union sentiments on the merging line in Antolovich's presence and again at a meeting of employees

attended by Hall and other supervisors. Olson and Garry Root were close relatives of Karen Root and, like Ford's brother, likely candidates for Company suspicion that they engaged in union activities. Garry Root was the subject of considerable interrogation by Tap and also the subject of Tap's statement to Edwards that G. Root had lied about union activities "to save his ass." Both Roots and Olson wore union buttons to work the day they were discharged. I have also credited a reported statement in the record by Antolovich that the Company was maintaining a complete record of who talked union at the plant. Certainly such a record must have contained the names of most, if not all, of the above-named employees since they did discuss unionization at the plant.

The discharge of Lidell Ford was a clumsy fabrication from beginning to end. Apparently someone vandalized the collator on November 6. The Respondent admits that anyone in the plant could have damaged the machine. Having heard of Lidell Ford's union outburst the following day, he then became the likely candidate, and was the subject of an investigation designed not to find out who actually damaged the machine but to pin a rap on Ford as the guilty party. Following the procedure of "verdict first, trial later", three supervisors came to the conclusion that Ford was the culprit. He was never asked if he was the one who damaged the machine. Hall admitted lying to Ford during the discharge interview by telling Ford that he had in his possession written statements naming Ford as the guilty party. He had no such statements. Serious efforts were taken to obtain such evidence in the days following Ford's discharge. One supervisor asked another employee to lie about seeing Ford tamper with the collator. Two other employees - whose stories were at wide variance - ultimately signed a paper implicating, though not directly naming, Ford as the one who damaged the machine. However, this statement was not in Company hands until long after Ford was discharged. Like the hearing examiner at the Michigan Employment Security Commission who heard this same defense during an unemployment compensation case, I conclude that there is not a shred of evidence that Ford damaged the Respondent's collator, either deliberately or through negligence. Moreover, the behavior of the Respondent makes it abundantly clear that it had no reasonable grounds to believe that Ford had done so and was scurrying about to find an evidentiary basis to support an action it had already taken. Later on, Hall admitted to Ford's brother that Ford's union activities played a partial role in his discharge. Coming as it did one day after Ford had urged mergers to refrain from signing up for Manpower so they could continue their organizing efforts, Ford's discharge was the direct result of Ford's union activities, which were the only

reason for his termination. By discharging Ford the Respondent violated Sections 8(a)(1) and (3) of the Act.

The next to go was Cannon. Like L. Ford, he was discharged within twenty-four hours after making a pro-union statement in the presence of supervisors. He complained publicly, in the presence of Hall and others, that the only reason for bringing Manpower into the plant was to stymie the organizing effort. The asserted reason for Cannon's discharge was errors made on the merging line. There is no doubt that he made some errors the day before in selecting collated packets of game sheets for merging into a full or completed packet. The exact number of errors is unknown, as is the magnitude of these errors in the context of the Respondent's operation. Antolovich's brother was guilty of similar errors on the same day and this fact was brought to the attention of Cannon's supervisor when the discharge was announced. The only reply made by D. Antolovich was that he would divide up the errors found and attribute an equal number to the other merger. However, he did not exact the same penalty from his brother that he did from Cannon.

Cannon had been an employee of the Respondent for nearly six months. His virtues and failings as an employee were well known. His discharge follows the familiar pattern of a marginal employee whose deficiencies could be overlooked until he became interested in union activities, at which time they were no longer tolerable. Fisher Stove Works (Gordon Cox), 235 NLRB 1032; Markle Manufacturing Company of San Antonio, 239 NLRB 1142; Washington Materials, etc. (Edward A. Winter), 276 NLRB No. 40. Since an expression of union sympathies was what triggered the removal of James Cannon, Jr., I conclude that his discharge violated Sections 8(a)(1) and (3) of the Act.

The decision of the Respondent in November, 1984, to require all of its employees other than the "original ten" to sign up for Manpower bears considerable scrutiny. Expressions in the record about "signing up for Manpower" tend to obscure the fact that all of the affected employees were in fact discharged by the Respondent. Whether or not any such employee signed up for Manpower after being discharged simply indicated whether or not he or she continued to perform work in the Respondent's plant. Those who opted for this route were no longer Middle Earth Graphics employees any more than were those who left the plant. Properly viewed, the question at issue is whether the decision of the Respondent to discharge all except its long time employees was discriminatorily motivated, or was it prompted by considerations

falling within the scope of business judgment.

This decision was taken at the same point in time that union activity began to surface at the Respondent's plant. Moreover, the economic benefits and cost effectiveness of the move were only casually considered by the Respondent before the decision was taken, if, indeed, such matters were even considered at all. Thirdly, at the beginning of May 1985, many of the employees who were required to become Manpower employees were taken back on the Middle Earth Graphics payroll. One of the reasons advanced by supervisors for this contrary move was that it was costing the Respondent more to maintain individuals on the Manpower payroll than it was to employ them directly. Hall stated in his testimony that the later move in 1985 was taken for reasons other than cost effectiveness. A fourth consideration relates to some of the reasons offered by Hall for making the move in the first place. Beginning in May of 1984, Respondent had experienced a sudden expansion of its work force. Many of its new employees proved to be unreliable and it was occasionally faced with shortages of unskilled (and sometimes semi-skilled) help to get out Cadaco orders. As Manpower representatives might well have pointed out, this was a situation in which a supplier of temporary help could be of assistance by providing, at short notice, additional employees to supplement absences or vacancies in an existing work force. Supplying temporary help for peak production periods or to replace absentee employees is one of the principal functions served by such companies. Hectic production problems fail to answer the question why the Respondent not only asked Manpower for additional help to get it through peak periods and to compensate for absenteeism among its regular work force but also placed some nineteen of its regular employees on the Manpower payroll under circumstances which admittedly proved more costly than simply keeping them on as Middle Earth employees and supplementing their efforts from time to time with temporary workers supplied by an outside firm.

The only excuse which lends any credence to the legitimacy of this decision is Respondent's excuse that it was trying to provide its regular employees with a source of income and employment if and when the Cadaco job ran out. Actually, the evidence in the record indicates that the Cadaco jobs continued to be produced in large quantities throughout the fall and winter of 1984-85. Moreover, it is also clear from the record that the Respondent's own income nearly doubled in 1985 over 1984. It had many commercial accounts other than the Cadaco job and it continued to service those accounts.

The record herein discloses that, at the time a union organizing drive surfaced, a bitterly antagonistic employer fired several key in-house organizers and discharged the bulk of its new employees, informing them that they could continue to earn a livelihood in its establishment only as the employees of another employer. Six months later, when it was faced with the prospect of bringing union sympathizers back to its payroll, it then transferred back to the same payrolls admittedly for reasons other than cost effectiveness, a number of former employees who had continued to work for it throughout the winter without engaging in any union activities. The effect of the second move - packing a prospective bargaining unit with employees of another employer (Manpower) to offset the return of union sympathizers - is simply reverse spin on the same tactic it followed in November. Respondent manipulated its staff to prevent unionization in November by transferring employees out and, faced with a contrary situation in May, took the opposite tack for the same underlying reason.

As the General Counsel points out, the Respondent's original intention was simply to use Manpower employees to replace its merging employees. When evidence evolved that union sentiment was spreading throughout the plant, the Respondent enlarged upon its original plan and discharged all of its bindery employees. By subcontracting this work to Manpower to avoid the unionization of its employees the Respondent violated Sections 8(a)(1) and (3) of the Act. The General Counsel does not seek a remedy for all of the employees who were treated in this fashion. However, the Roots, Wayne Ford, and Olson were seen as prominent in the union effort and were discharged as a part of this defensive scheme. Accordingly, their discharges violated Sections 8(a)(1) and (3) of the Act. The fact that any or all of them could have applied for and obtained jobs with Manpower is an irrelevancy which bears, if anything, only upon the remedy in this case, not upon a determination of whether in fact a violation of the Act took place when they were discharged.

4. Reinstatement and Post-Settlement Activity

It is well settled that pre-settlement activity of a respondent may be examined and relied upon in assessing its conduct following the execution of the settlement agreement to determine if any post-settlement conduct amounts to an unfair labor practice. Laborers' Local 185 (Joseph's Landscaping), 154 NLRB 1385; Lawyers Cooperative Publishing Company, 273 NLRB No. 31. To warrant setting aside a settlement agreement, the General Counsel must establish that, following the execution of the agreement, the Re-

spondent either failed to comply with its specific terms or that it engaged in subsequent unfair labor practices. If the General Counsel is successful in establishing either or both of these facts, then the settlement agreement may be treated as if it had not been executed, and the original complaint, as well as any subsequent complaint, may be prosecuted as if the settlement had never taken place. Contrary to contentions made by the Respondent, the mere execution of a settlement agreement constitutes neither the withdrawal nor the dismissal of a complaint and does not bar future prosecution if the settlement is not honored.

The Respondent herein agreed on April 22, 1985, to offer to the six named discriminatees full and immediate reinstatement to their former or to substantially equivalent employment in the event that their former jobs no longer existed. What constitutes a valid offer of reinstatement has been the subject of extensive litigation extending over a long period of time. In order to constitute a valid offer of reinstatement, the offer of work must be specific, unequivocal, and unconditional.¹² The work offered must entail similar skills, similar pay, and similar working conditions.¹³ A mere inquiry, directed to an employee for the purpose of ascertaining whether or not he is available for work, does not constitute an offer of reinstatement.¹⁴ Asking employees to come back to work and then telling them that business had not picked up sufficiently to permit reinstatement is a contradiction that amounts to no offer of reinstatement at all.¹⁵ An uncommunicated offer of reinstatement is no offer of reinstatement at all.¹⁶ An employee has no obligation to decide whether he wishes to return to work until he has received a valid offer of reinstatement.¹⁷ Only when an offer of reinstatement has been unequivocally rejected is an employer relieved of his

¹² Information Control Corporation, 196 NLRB 504; Controlled Alloy, Inc., etc., 208 NLRB 882; Standard Aggregate Corporation, 213 NLRB 154; Moro Motors, Ltd., 216 NLRB 192.

¹³ Holiday Radio, Inc., 275 NLRB No. 184.

¹⁴ Rea Trucking Company, 175 NLRB 520; National Business Forms, 189 NLRB 460.

¹⁵ W.C. McQuaide, Inc., 220 NLRB 593, enf. in pertinent part 552 F.2d 519 (3rd Cir., 1977).

¹⁶ I.H. Rutter-Rex Manufacturing Co., 158 NLRB 1414.

¹⁷ The Richard W. Kaase Company, 162 NLRB 1230.

duty to reinstate an employee.¹⁸ An offer of a few days work or an offer of part-time work to a full-time employee does not constitute an offer of reinstatement.¹⁹ An employee must be given a reasonable time in which to accept a valid offer of reinstatement. Two and four days, respectively, as well as three weeks, have been held not to be a reasonable time to accept such an offer.²⁰ Conditioning reinstatement on avoidance of future union activities is not a valid offer.²¹ If an employer asserts an economic defense, such as unavailability of jobs, to justify not making a valid offer of reinstatement, the burden is upon it to establish such a defense by a preponderance of credible evidence.²² Tested by these principles, the Respondent herein has yet to make a valid offer of reinstatement to any of the six discriminatees in this case, with the possible exception of Karen Root.

Under certain circumstances, an economic defense may serve to toll the backpay liability of an employer who is under an obligation to offer reinstatement to designated employees and does not do so. However, no economic defense short of plant closing serves to erase the reinstatement obligation of an employer who is required to offer reinstatement and has failed to do so. In this case, the Respondent played games with the six discriminatees in an effort to strike them from its rolls on a permanent basis while giving lip service to the obligation it incurred when it signed the April 22 settlement. The letter which the Respondent wrote to the six discriminatees on May 9, offering reinstatement but no jobs, was patent nonsense. Whether it tolled a backpay liability will be discussed infra. As satisfaction of a reinstatement obligation it was a nullity.

It should be noted that all six discriminatees were permanent full-time employees. The definitions of permanent employee and full-time employee are contained in the Respondent's handbook, either explicitly or by necessary inference. The handbook

¹⁸ Leo Rosenblum, d/b/a/ Crown Handbag of California, etc., 137 NLRB 1162.

¹⁹ Elite Chief, Inc., 258 NLRB 1124; C.S. McCrossan, Inc., 272 NLRB 414; Seyforth Roofing Co. of Alabama, Inc., 263 NLRB 368.

²⁰ Matlock Truck Body and Trailer Corp., 248 NLRB 461; Harowe Servo Controls, Inc., 250 NLRB 958; Browning Industries, Inc., 213 NLRB 269.

²¹ Standard Aggregate Corporation, supra.

²² W.C. McQuaide, Inc., 237 NLRB 177

defines probationary employee as one who has worked more than three months. By implication anyone who had served more than three months was no longer in this status. If he was also a full-time employee, he was eligible for certain stated company benefits. All of the discriminatees had worked at least five months at the time of their respective discharges and were eligible for company benefits. A full-time employee is defined in this booklet as anyone who works an average of 36 hours a week or more. This definition fitted all of the discriminatees, many of whom were complaining because they had been working 50 or 60 hours a week. When the Respondent began referring to them and to others similarly situated as part-time employees, it was not only violating common usage in the English language but the definition contained in its handbook.

The offer of a few days' work to Karen Root late in June, 1985, did not constitute reinstatement to her former or substantially equivalent employment. It was only an offer of a few days' work, not permanent employment. Her recall late in July was arguably reinstatement to a permanent position. However, she worked only six more weeks before she was laid off again. She has not been recalled since that layoff. When she was laid off again in September, Plant Manager Harris told her that the layoff would be short, that he was going to operate on a skeleton crew for a week, and that she would be called back in order of seniority. In fact, throughout the fall of 1985, others with less seniority than Mrs. Root continued to work along with employees who were brought in from time to time from various temporary services. Despite the fact that the Respondent has continued to prosper and to produce substantial numbers of Cadaco games along with its regular commercial work, Mrs. Root has not been working. I conclude that the layoff of Karen Root on September 20 was discriminatorily motivated, as was her discharge ten months earlier, and that by laying her off and failing to recall her, the Respondent herein violated Sections 8(a)(1) and (3) of the Act.

Wayne Ford was recalled to work for two or three days late in June. Since it was a recall to temporary work, it did not satisfy the Respondent's reinstatement obligation. Moreover, the letter which he received at that time giving him only a day's notice to report was not sufficient to satisfy a reinstatement obligation, notwithstanding the fact that Ford was able to respond to it.

In early August, W. Ford called the plant and asked for work. He was told there was none available. However, he was told that he would have to maintain a telephone in order to be eligible for recall. This instruction was confirmed by a letter which was

sent the next day. Placing such a condition upon Ford's right of reinstatement violated the terms of the settlement agreement as well as settled Board law. The call to W. Ford at 3:50 a.m. in the morning for the asserted purpose of having him report for two or three days' work at 7:30 a.m. on the same day likewise is not a valid offer of reinstatement. Inasmuch as Chalker never told Ford to report or even transmitted such a message through a third person, the call was not an offer at all. It was merely an act of harassment. Accordingly, I conclude that the Respondent failed utterly in its obligation to offer W. Ford reinstatement to his former or substantially equivalent work. Moreover, the Respondent was not satisfied merely to leave W. Ford in the position of an unreinstated employee. When he did not report at 7:30 a.m. in response to an offer which he did not receive, either actually or technically, it discharged him in violation of Sections 8(a)(1) and (3) of the Act.

Late in June, Csiszar spoke with Garry Root and offered him what was essentially part-time employment of a temporary nature. The offer failed to give Root a reasonable opportunity to conclude his present employment and report for work. The excuse used with respect to him as well as other employees, namely that the Respondent could not give much advance notice or written notice to report to work because of the sporadic nature of its operation, simply illustrates that the offers which it was making to the six discriminatees were not bona fide offers of permanent employment but were merely attempts to remove the discriminatees from its rolls while offering colorable compliance with the settlement agreement. I conclude that the overture made to Garry Root was not a bona fide offer of reinstatement and that the Respondent has failed to comply with the terms of the settlement agreement with respect to his employment.

I have concluded that, as a matter of fact, Olson was never sent a letter of any sort which offered him employment of any kind. Moreover, Chalker testified that the work available for Olson when the disputed letter was sent was of two or three days' duration. Accordingly, Olson was never given a bona fide offer of reinstatement, as required by the terms of the settlement agreement.

Hall's letter to Cannon, dated June 26, instructing him to report for work no later than June 28, was insufficient notice to constitute a valid offer of reinstatement. The fact that the letter did not reach Cannon until several days after June 28 merely compounds the failure of the Respondent to honor its contractual commitment. When Cannon responded to the letter, the management of the Respondent refused to speak to him, thus demonstrat-

ing that the Respondent was simply trying to avoid bringing him back to work while laying a paper trail suggesting compliance with the settlement.

As noted above, a valid offer of reinstatement must be made to the same position or to a substantially equivalent one. In the case of Lidell Ford, he was brought back to work on August 19 at a job which required the exercise of substantially greater skill than the one which he vacated when he was discharged. The Respondent had reason to believe that Ford was not capable of performing the tasks to which he was assigned on August 19 because he had never performed that job before. As anticipated, Ford was not up to operating the collator in the stitcher mode nor was he able to set it up for stitching. The reason he was assigned this was obvious. The Respondent wanted to embarrass Ford and to put him in a position in which he would either quit or take a lower paying job. Ford chose the latter route. Chalker then decided to rub it in by giving him a reprimand for reporting late for work when in fact he was told in writing that he had until August 19 to report. The reprimand recites allegations which were factually false and does so in such a manner which laid a groundwork for a discharge for cause. The reason for both of these moves was the Respondent's abiding hostility to unionization and to Ford, whom it continued to regard as a principal cause of the union effort in its plant. The August 19 recall does not amount to reinstatement and the reprimand, motivated as it was by anti-union considerations, violated Section 8(a)(1) of the Act.

Since the Respondent has yet to offer Ford a reinstatement which comports with its obligations under the April 22 settlement agreement or under the Act, that obligation remains in order to remedy the unfair labor practice which it committed on November 8, 1984. During August and September, Ford continued to promote the union cause actively. On September 20, 1985, he was laid off along with Karen Root. As in the case of Karen Root, Ford was told at this time that the layoff was prompted by lack of work and that he would be called back in order of seniority when work again became available. Respondent has not recalled Ford but continued to employ individuals with less seniority, including persons referred by temporary employment services, throughout the fall of 1985. During this period of time, it has continued to perform a large amount of work both for Cadaco and for its other customers. As in the case of Karen Root, I conclude that this layoff was discriminatorily motivated and, as such, violated Sections 8(a)(1) and (3) of the Act.

The second Complaint alleges that certain of the Respondent's actions violated Section 8(a)(4) of the Act. There is no doubt that the six discriminatees herein and others filed charges and that certain unlawful acts were committed by the Respondent following the filing of those charges. However, there is some doubt that the filing of charges added anything but context to the actions taken by the Respondent, i.e., but for the filing of the charges, the settlement agreement could never have taken place. However, Respondent's underlying motive was, and remained, its implacable opposition to unionization and to those who engaged in union activities. The fact that these individuals sought redress with the Board added nothing to the Respondent's determination to get rid of them. Accordingly, I would dismiss so much of the Consolidated Complaint that alleges that the Respondent violated Section 8(a)(4) of the Act.

Upon the foregoing findings of fact and upon the entire record herein considered as a whole, I make the following:

II. Conclusions of Law

1. Respondent Middle Earth Graphics, Inc., is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Sections 2(2), 2(6), and 2(7) of the Act.

2. United Paperworkers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging James Cannon, Jr., Lidell Ford, Jr., Wayne Ford, Karen Root, Garry Wayne Root, and Clark Olson because of their union sympathies and activities, and by subcontracting work to another employer and discharging employees in order to prevent the unionization of the plant, the Respondent herein violated Section 8(a)(3) of the Act.

4. By the acts and conduct set forth in Conclusion of Law Number 3; by threatening employees that the Respondent would close the plant if it became unionized; by coercively interrogating employees concerning their union activities and the union

activities of other employees, by telling an employee that she would not be discharged if she did not talk union in the plant; by soliciting an employee to commit perjury in order to support the Respondent's version of a discharge; by telling an employee that another employee lied to prevent reprisals from being taken against him for his union activities; by telling an employee that it had fired another employee because of his union activities, by telling an employee that no reprisals would be taken against him if he did not talk about the union; and by issuing a reprimand against an employee in reprisal for union activities and for the purpose of laying the groundwork for his eventual discharge, the Respondent herein violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices have a close, intimate, substantial, and adverse impact upon the free flow of commerce within the meaning of Sections 2(6) and 2(7) of the Act.

III. Remedy

Having found that the Respondent herein has committed certain unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and to take other actions designed to effectuate the purposes and policies of the Act. Since the violations of the Act found herein are repeated and pervasive, and since they demonstrate an attitude on the part of this Respondent to behave in complete disregard of the rights of its employees, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that Section of the Act. Hickmott Foods, Inc., 242 NLRB 1357. I will also recommend that the Respondent be required to offer to James Cannon, Jr., Lidell Ford, Jr., Wayne Ford, Karen Root, Garry Wayne Root, and Clark Olson full and immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or to other rights which they previously enjoyed, and that they be made whole for any loss of pay or benefits which they may have sustained by reason of the discriminations practiced against them, to be computed in accordance with the Woolworth formula,²³ with interest thereon at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments. Olympic Medical Corporation, 250 NLRB 246; Isis Plumbing & Heating Company, 138 NLRB 716. I will recommend that the Respondent be required to expunge from its records any reference to the unlawful discharges or unlawful disciplinary warnings relating to the discriminatees herein, and

²³ F.W. Woolworth Co., 90 NLRB 289.

that it notify these employees in writing that such acts have been done and that their unlawful discharges and unlawful discipline will not be used as a basis for future disciplinary actions against them. I will also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results of this case.

Upon the foregoing findings of fact and conclusions of law, upon the entire record herein considered as a whole, and pursuant to Section 10 (c) of the Act, I make the following recommended:²⁴

ORDER

Respondent Middle Earth Graphics, Inc., and its officers, agents, supervisors, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities and the union activities of other employees.

(b) Threatening to close the plant if the employees become unionized.

(c) Telling employees that they will not be discharged or suggesting that reprisals will not be taken against them so long as they refrain from talking about the union.

(d) Soliciting employees to commit perjury in order to support the Respondent's version of a discharge.

(e) Telling employees that other employees lied to prevent reprisals from being taken against them for their union activities.

(f) Telling employees that it had fired another employee because of his union activities.

(g) Issuing reprimands against employees in reprisal for their union activities or for the purpose of laying the groundwork for an eventual discriminatory discharge.

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(h) Discouraging membership in and activities on behalf of United Paperworkers International Union, AFL-CIO-CLC, or any other labor organization, by discharging employees, contracting out their work, or otherwise discriminating against them in their hire or tenure or in their terms and conditions of employment.

(i) By any other means or in any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions designed to effectuate the purposes and policies of the Act:

(a) Offer to James Cannon, Jr., Lidell Ford, Jr., Wayne Ford, Karen Root, Clark Olson, and Garry Wayne Root full and immediate reinstatement to their former positions, or in the event that such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or to other rights which they formerly enjoyed, and make them whole for any loss of pay or benefits which they may have suffered by reason of the discriminations found herein, in the manner described above in the Section entitled "Remedy."

(b) Expunge from its personnel records any reference to the discriminatory discharges of the above-named employees and the unlawful disciplinary warning given to Lidell Ford, Jr., and notify each employee in writing that these discharges and warning will be used as a basis for future discipline against them.

(c) Post at its Kalamazoo, Michigan, plant copies of the attached notice marked "Appendix." Copies of the Appendix, to be furnished to the Respondent by the Regional Director for Region 7 and signed by a representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and shall be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

²⁵ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll and other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the receipt of this Decision what steps it has taken to comply herewith.

Insofar as the Consolidated Complaint herein alleges matters not found to be violative of the Act, the said Consolidated Complaint is hereby dismissed.

Dated, Washington, D.C. June 6, 1986

Walter H. Maloney, Jr.
Administrative Law Judge

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

MIDDLE EARTH GRAPHICS, INC., IS POSTING THIS NOTICE TO COMPLY WITH THE PROVISIONS OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD. THIS ORDER WAS ISSUED AFTER A HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE IN WHICH WE WERE FOUND TO HAVE VIOLATED CERTAIN PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT.

WE WILL NOT coercively interrogate our employees concerning their union activities or the union activities of other employees.

WE WILL NOT threaten to close the plant if the employees become unionized.

WE WILL NOT suggest to employees that they will not be discharged so long as they refrain from talking about the union.

WE WILL NOT solicit employees to commit perjury in order to support our version of a discharge.

WE WILL NOT tell employees that other employees lied in order to prevent reprisals from being taken against them for their union activities.

WE WILL NOT issue reprimands against employees in reprisal for their union activities or for the purpose of laying the groundwork for an eventual discriminatory discharge.

WE WILL NOT discourage membership in or activities on behalf of United Paperworkers International Union, AFL-CIO-CLC, or any other labor organization, by discharging employees, contracting out their work, or otherwise discriminating against them in their hire or tenure or in their terms and conditions of employment.

WE WILL NOT by any other means or in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL offer full and immediate reinstatement to JAMES

CANNON, JR., LIDELL FORD, JR., WAYNE FORD, KAREN ROOT, CLARK OLSON, and GARRY WAYNE ROOT to their former or substantially equivalent employment, and WE WILL make them whole for any loss of pay or benefits which they may have suffered by reason of the discriminations practiced against them, with interest.

WE WILL expunge from our personnel records any reference to the discharges of the above-named individuals and the unlawful disciplinary warning given to LIDELL FORD, JR., and we will inform these individuals in writing that the discharges and warning will not be used against them in the future as the basis for disciplinary action.

MIDDLE EARTH GRAPHICS, INC.
(Employer)

Dated _____

By _____
(Representative)(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue - Room 300, Detroit, Michigan, 48226, telephone (313) 226-3244.

APPENDIX E

HOUSE REPORT NO. 245 ON H.R. 3020, APRIL 11, 1947
(Legis. History, Vol. I, 292, 299, 324)

FREE SPEECH

Although the old Labor Board protests it does not limit free speech, it is apparent from decisions of the Board itself that what persons say in the exercise of their right of free speech has been used against them. The bill provides that the new Board is prohibited from using as evidence against an employer, an employee, or a union any statement that by its own terms does not threaten force or economic reprisal.

Section 8(d)(1)—This guarantees free speech to employers, to employees, and to unions. Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely. Thus, if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct, the Board may say that the official's misconduct warranted his being discharged, but "infer," from what the employer said, perhaps long before, that the discharge was for union activity, and reinstate the official with back pay. It has similarly abused the right of free speech in abolishing and penalizing unions of which it disapproved but which workers wished as their bargaining agents. The bill corrects this, providing that nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it unless it, standing alone, is unfair within the express terms of sections 7 and 8 of the amended act.

HOUSE MINORITY REPORT NO. 245 ON H. R. 3020,
(April 12, 1947)
(Legis. History, Vol. I, 355, 375-76)

10. *Free Speech*

Section 8(d)(1) provides that it shall not constitute evidence of an unfair labor practice to express "any views, arguments, or opinions" in written, printed, or visual form if the expression by its own terms does not threaten force or economic reprisal.

The right to express an opinion is a constitutional one. In *N.L.R.B. v. Virginia Electric & Power Co.* (314 U.S. 469), and *N.L.R.B. v. American Tube Bending Co.* (134 F.2d 993 (C.C.A.2), certiorari denied 320 U.S. 768), it was held that the first amendment protects an employer's expressions of noncoercive opinion to his employees respecting union organization.

These decisions have guided the present Board. In its own most recent case on the subject, *Matter of Bausch and Lomb Optical Company* (72 N.L.R.B. No. 21) the Board held that an employer's distribution to his employees of an extremely vigorous antiunion pamphlet, entitled "Let's Face the Facts," was not an unfair labor practice. The Board said:

The pamphlet on its face contains no coercive statements, but consists essentially of statements disparaging unions and of expressions of opinion as to the disadvantages of labor organization—statements which standing alone, are protected by the constitutional guaranty of free speech. Nor are the statements coercive when evaluated in the context in which they were made.

But these provisions go far beyond mere protection of an admitted constitutional right. By saying that statements are not to be considered as evidence, they insist that the Board and the courts close their eyes to the plain implications of speech and disregard clear and probative evidence. In no field of the law are a man's statements excluded as evidence of an illegal intention. Here, again, a deep-seated intention to protect employers in the commission of unfair labor practices is evident. Here, again, the laudable purpose of protecting free speech cloaks an evil design to encourage unfair labor practices by employers.

SENATE REPORT NO. 105 ON S. 1126, APRIL 17, 1947
(Legis. History, Vol. I, 407, 429-30)

Section 8(c): Another amendment to this section would insure both to employers and labor organizations full freedom to express their views to employees on labor matters, refrain from threats of violence, intimation of economic reprisal, or offers of benefit. The Supreme Court in *Thomas v. Collins* (323 U.S. 516) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the *American Tube Bending* case (134 F. 2d 993). The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (*Monumental Life Insurance*, 69 N.L.R.B. 247) or if the speech was made in the plant on working time (*Clark Brothers*, 70 N.L.R.B. 60). The committee believes these decisions to be too restrictive and, in this section, provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement. The Board, of course, will not be precluded from considering such statements as evidence.

REMARKS OF SENATOR MORSE
Congressional Record, Senate - May 2, 1947
(p.4555) (Legis. History, Vol. II, 1193-94)

I certainly hope, Mr. President, that we have not reached the point where it is going to be deemed desirable to have the National Labor Relations Board take jurisdiction of complaints as to whether a union's statements at the time of organization are true or false. We certainly do not want to make the National Labor Relations Board the guardian, as it were, of the intellectual integrity, at the time of an organizational drive, of the statements made by either labor or employers.

In a case involving the validity of a Board order the Sixth Circuit Court of Appeals ruled that an employer's statement did not become coercive because it was inaccurate. The court found, contrary to the Board, that the employer was justified in believing and stating that the union had been responsible for a protest to a State agency, which resulted in the agency's rescinding its approval of overtime. The court said:

The right of free speech does not depend upon the accuracy of the ideas expressed. (*N.L.R.B. v. Brown-Brockmeyer Co.*, 143 F. (2d) 537, at 542.)

The Eighth Circuit Court of Appeals has correctly stated that—

The trend of judicial decision since the Virginia Power Co. case supports the view that an employer may disseminate facts within the area of dispute, may even express his opinion—

Which he certainly should be allowed to do—on the merits of the controversy even though it involves labor organizations, may indicate a preference for individual dealings with employees, may state his policy with reference to labor matters, and may express hostility to a union or its representatives. (*N.L.R.B. v. J.L. Brandeis & Son*, 145 F. (2d) 556, 564.)

Those are not my words, Mr. President. Those are the words of the Circuit Court of Appeals, as found in the *Brandeis & Son* case.

The court went further, and in overruling the Board's contention that "the repetition and vehemence of statement" rendered the employer's statements coercive, stated:

Certainly effectiveness of statement is not a test of its constitutionality; neither is accuracy of the views expressed * * * One may descend to villification, false statement, or exaggeration and still be protected in his right of free speech. (*Id.* p., 566.)

REMARKS OF SENATOR McCLELLAN,
Congressional Record, Senate - May 9, 1947 (p. 5094-95)
(Legis. History, Volume II, 1432-33)

MR. McCLELLAN. Mr. President, I offer an amendment which I send to the desk and ask to have stated.

THE PRESIDING OFFICER. The Clerk will state the amendment.

THE CHIEF CLERK. On page 16, at the end of line 20, it is proposed to strike out the period and insert a colon and the following: "Provided, That no language or provision of this section is intended to nor shall it be construed or administered so as to abridge or interfere with the right of either employers or employees to freedom of speech as guaranteed by the first amendment to the Constitution of the United States."

Mr. McCLELLAN. Mr. President, the purpose of the amendment is to attempt to say what I think every Member of Congress should truly mean, and that is no contravention of the Constitution. This amendment deals with one of the fundamentals of liberty, that is, freedom of speech.

In the bill that has passed the House, as well as in the Senate committee bill, the one pending before us, an effort has been made more or less to limit and define what restrictions shall be placed on freedom of expression as between employers and employees, what speech should be regarded as an unfair labor practice. The House bill provides that it will not be an unfair labor practice to express "any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, if it does not by its own terms threaten force or economic reprisal."

In other words, under the terms of the House text, unless the written or spoken words, by its terms, carry a threat of force or economic reprisal, then it would not constitute an unfair labor practice.

Under the Senate committee bill it is provided that—
The Board shall not base any finding of unfair-labor practice upon any statement of views or arguments, either written or oral, if such statement contains under all the circumstances no threat, express or implied, of reprisal or force, or offer, express or implied of benefit.

I am concerned about that language, Mr. President. I would like to see it strengthened. The language of the present law, the

National Labor Relations Act, has been so distorted by court decisions and by administrative decisions that freedom of speech has definitely been abridged and denied to many of our citizens.

Mr. FERGUSON. Mr. President, will the Senator yield?

Mr. McCLELLAN. I am glad to yield.

Mr. FERGUSON. I was wondering how this amendment would change the law. The highest law of the land, namely, the Constitution, is being cited in this amendment. If the same court is to construe this law which has been construing the Constitution, how can any change be effective?

Mr. McCLELLAN. Mr. President, we may never get any change, but I would like in this bill, to emphasize the fact that it is not the intent of Congress and of the Senate by this legislation to in any way abridge freedom of speech, and that in my judgment has been the result and the consequence of court decision and administrative decision in the past with respect to the present law. I call attention to the fact that the present law was not so restrictive as are the provisions that I have referred to in the two measures.

Mr. MORSE. Mr. TAFT, and Mr. FERGUSON addressed the Chair.

THE PRESIDING OFFICER. Does the Senator from Arkansas yield; and if so, to whom?

Mr. McCLELLAN. I yield first to the Senator from Oregon.

Mr. MORSE. I want to say to the Senator from Arkansas that I am in complete agreement with the Senator from Michigan. We had in one of the committee prints language similar to that proposed by the Senator from Arkansas, but it was decided, as I recall unanimously, that it was unnecessary; because, of course, it would be impossible to enact any law that could possibly be sustained, if it involved a violation of the first amendment of the Constitution of the United States. But so far as I am concerned— and I think it will be found that other members of the committee share this view — I am perfectly willing to accept this amendment, if the Senator from Arkansas wishes to have it inserted in the bill.

Mr. McCLELLAN. I appreciate the statement by the Senator from Oregon, and I will say to him that I do not wish to delete any language of the bill as it stands at present, but I would like to have this provision incorporated in the new law. Whether the court knows it or not, whether administrative officers will know it or not, every other citizen with common understanding and who can read the language will know that it was not the intent of Congress to deprive any citizen, either employer or employee of a right guaranteed under

the Constitution.

HOUSE CONFERENCE REPT. NO. 510, ON H.R. 3020 -

JUNE 3, 1947

(Legis. History, Vol. I, 505, 549)

(5) Both the House bill and the Senate amendment contained provisions designed to protect the right of both employers and labor organizations to free speech. The conference agreement adopts the provisions of the House bill in this respect with one change derived from the Senate amendment. It is provided that expressing any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, is not to constitute or be evidence of an unfair labor practice if such expression contains no threat of force or reprisal or promise of benefit. The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law. The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination.

REMARKS OF CONGRESSMAN MADDEN
Congressional Record, House — June 4, 1947 (6542)
(Legis. History, Vol. I, 887)

Section 8(c) goes far beyond the mere protection of the constitutional right of free speech and prescribes that statements which contain no threat of reprisal or force or promise of benefit may not even be considered as evidence of an unfair labor practice. In no other field of law are a man's statements excluded as evidence of an illegal intention.

REMARKS OF SENATOR TAFT
Congressional Record, Senate - June 5, 1947
(p. 6598, 6601)
(Legis. History, Vol. II, pp. 1535, 1540-41)

Mr. TAFT. . . . Mr. President. I ask that there be printed in the RECORD at this point as a part of my remarks a summary in detail of the principal differences between the conference agreement and the bill which the Senate passed.

* * * * *

Subsection (c) relating to the right of employers, employees, and labor organizations to express opinions and views freely conforms substantially with the language of subsection 8(d)(1) of the House bill and is a substitute for section 8(c) of the Senate amendment. The House conferees were of the opinion that the phrase "under all the circumstances" in the Senate amendment was ambiguous and might be susceptible of being construed as approving certain Board decisions which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices. Since this was certainly contrary to the intent of the Senate, as the accompanying report of the committee with respect to this subsection indicates, the Senate conferees acceded to the wish of the House group that the intent of this section be clarified.

Since the adoption of the conference agreement some inquiries have been received as to whether or not the guarantee of freedom of expression contained in this section is limited to expressions "which are not printed, graphic. * * *." These words are not words of limitation but were added in the House bill so as to make it clear that freedom of expression was not confined to oral utterances. The language of the report of the House committee makes it clear, moreover, that what the sponsors of the House bill had in mind were primarily oral utterances. There has also been some question raised with respect to the phrase "constitute or be evidence of an unfair labor practice." The purpose of this language is to make it clear that the Board is not to use any utterances containing threats or promises of benefit as either an unfair practice standing alone or as making some act which would otherwise not be an unfair labor practice, an unfair labor practice. It should be noted that this subsection is limited to "views, argument, or opinions" and does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence. In other words this section does not make incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law.

REMARKS OF SENATOR PEPPER AND SENATOR TAFT
Congressional Record, Senate - June 5, 1947
(pp. 6603-04) (Legis. History, Vol. II, pp. 1545-46)

Mr. PEPPER. Mr. President, will the Senator further yield?

Mr. TAFT. I yield.

Mr. PEPPER. In the paragraph immediately following the paragraph which we have been discussing, subparagraph (c) on page 8, the following language appears:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit.

Under that provision, if an employer were to say on Monday, "I hate labor unions, and I think they are a menace to this country", and if he fired a man on Thursday and the question was whether that man was fired for cause or fired because he was agitating for a union in the plant, would the statement made on Monday, in which the man said, "I think labor unions are a menace to this country" be admissible in evidence as bearing on the question of the reason for the discharge.

Mr. TAFT. All these questions involve a consideration of the surrounding circumstances. It would depend upon the facts. Under the facts generally stated by the Senator, I think that statement would not be evidence of any threat. There would have to be some other circumstances to tie in with the act of the employer. If the act of discharging is illegal and an unfair labor practice, consideration of such a statement would be proper. But it would not be proper to consider as evidence in such a case a speech which in itself contained no threat express or implied. That is the effect of the House language which we accepted.

Mr. PEPPER. If the Senator will permit, that is the point I want to emphasize —

Mr. TAFT. That is the effect of the House language.

Mr. PEPPER. That under the criminal law at the present time any statement a man may make prior to a given act which the court may try to evaluate may be admitted in evidence as having some relationship to his intentions. But the conference report deliber-

ately excludes statements of that sort, unless the statement contains an actual threat, thereby depriving the Board of the full evidence in the case.

Mr. TAFT. So long as the Board has a statement of that kind the employer's mouth is practically shut. In case he makes a speech later on and is charged with some unfair or unlawful labor practice, and that can be considered in evidence, it means that he cannot afford to speak at all. Without that provision there is not freedom of speech. I say that is one thing that a man ought to have. He ought to have freedom of speech, and it seems to me we should put in the word "evidence."

REMARKS OF SENATOR MORSE
Congressional Record, Senate - June 5, 1947
(p. 6610) (Legis. History, Vol. II, p. 1555)

One of the most objectionable and destructive provisions in the bill, is the free-speech amendment made in conference. The Senate bill would have insured both to employers and labor organizations full freedom to express their views on labor matters, but at the same time would have protected employees against a course of conduct by an employer which, although it included statements, was in fact coercive and intimidatory. Under the conference version, however, it is provided in substance that views, arguments, or opinions of the employer may not even be used as evidence of motive, intention, or design, in connection with any unfair labor practices under the act, unless the expressions themselves contain threats of force or economic reprisal, or promises of benefit.

As it was brought out earlier in the debate this afternoon, I believe by the Senator from Florida [Mr. PEPPER], this is an astounding proposition. Even in the criminal law, views, arguments, and opinions are received as competent evidence of motive. Under this amendment, however, the Board and the courts must close their eyes to the plain implications of speech; and they must disregard clear and probative evidence of motive, or prejudice, or bias. If an employee were discharged for union activities, for example, the Board could not use as evidence of the employer's purpose, any expressions which were not in themselves coercive, no matter how revealing they might be of the employer's true reasons for the discharge. Under this provision, too, a employer could urge his employees to form a union, could suggest a constitution and bylaws, could recommend an attorney, and could propose who the leaders of the reorganization should be, and he, nevertheless, would be immune from charges of unfair labor practices for forming and instigating what clearly would be a company union in every sense. This is so because, by the clear language of section 8(c) of the bill, the employer's views or arguments shall not be evidence of an unfair labor practice.

I think we would be far more honest and candid with American labor, and fairer to it, too, if we repealed the act instead of adopting an amendment such as this.

REMARKS OF SENATOR MURRAY
Congressional Record, Senate - June 6, 1947
(p. 6656) (Legis. History, Vol. II, p. 1565, 1566)

In my judgment, one of the fatal steps taken by the conferees was to adopt the House provision respecting freedom of speech. We noted in our minority report on Senate bill 1126 that the definition of free speech adopted by the Senate was sound and workable. But now the conferees have adopted a provision which states that the "expressing of any views shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act" unless it contains a threat or promise of benefit. If what an employer or a trade unionist says may not be used in evidence, how is any case under this bill ever to be proved? Through careless draftsmanship, such statements are apparently incompetent as evidence only if in written, printed, graphic or visual form, though I assume that oral statements are also to be excluded. This provision is like saying that because one has the right to express hostility to another, such a statement is not admissible in a murder trial. No comparable rule, I am certain, has ever been adopted for any type of proceedings.

REMARKS OF SENATOR MURRAY
Congressional Record, Senate — June 6, 1947
(pp. 6660, 6662)
(Legis. History, Vol. II, p. 1575, 1580)

Mr. MURRAY subsequently said:

Mr. President at the time I addressed the Senate earlier in the day, I had intended to offer for the RECORD an analysis of Title I of H.R. 3020. I now ask that the analysis may be printed in connection with my remarks, at the end of my remarks.

* * * * *

Section 8(c): The bill further amends section 8 of the Wagner Act by the addition of section 8(c). This section provides that "expression of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice *** if such expression contains no threat of reprisal or force or promise of benefit." This provision for some reason does not expressly include oral expressions of views. This omission in view of the express reference to written statements would appear to be inadvertent.

Comment: This provision was substituted by the conference committee for the Senate provision prohibiting the Board from finding any noncoercive statement to be an unfair labor practice. It thus goes far beyond the Senate provision and far beyond the mere protection of an admitted constitutional right. By saying that statements are not to be considered as evidence, the bill requires the Board and the courts to close their eyes to the plain implications of speech and disregard clear and probative evidence. In no other field of law are a man's statements thus excluded as evidence of an illegal intention. The sweeping character of the prohibition is such that, if enacted into law, it will seriously circumscribe the Board in the prevention of the unfair practices proscribed by the bill. In this connection it should be noted that this limitation would apply not only to employer violations of the act but also to union unfair labor practices as well.

REMARKS OF SENATOR PEPPER
Congressional Record, Senate - June 6, 1947
(pp. 6673-74) (Legis. History, Vol. II, p. 1590-91)

I come to the next subsection, (c) which reads as follows:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit.

What does that mean?

First, let me state what the law is at the present time. Under the present law, it is an unfair labor practice for an employer to discharge a worker because he attempts to organize or to join a union. The question is always at issue in such a case before the National Labor Relations Board as to what was the real reason for the discharge of the employee. Was he incompetent? Did he violate the rules of the company? Or was he discharged because he was trying to organize or to join a union? The Board has to take all the evidence. It has to have a trial, the way a court would, to determine what was in the mind of the employer when he fired the worker. Why did he fire him? Under the present law, in such a trial anything the employer wishes to introduce, as in a civil or criminal trial, if it is relevant, can be admitted in evidence and considered by the Board.

Suppose 10 workers are fired. Under the present law they make a complaint to the National Labor Relations Board. The Board has a trial to determine from the evidence what was the reason for the discharge of those 10 workers. Was it because they were trying to organize a union in that plant, or was it because they were the 10 most inefficient workers in the organization? Under the present law, if someone heard the employer say, "I hate labor unions; they are a menace to America," that statement could be admitted in evidence. The Board could consider it and weigh it in connection with the act of the employer in discharging those 10 workers. But there were some good lawyers working on this conference report. Some very able, competent lawyers were working on it. They provided that what a man says or writes or prints cannot even be put in evidence unless the statement itself is complete with a threat. In that connection, let us

consider a comparable situation; namely, a case in criminal law. Suppose a defendant is on trial for murder, and suppose he has an alibi; suppose he says, "I am a good friend of the deceased. I did not have anything to do with his death. I was somewhere else." Suppose a witness states that a week before the murder the defendant said, "I hate that fellow. He ought to be dead." That testimony would be admissible in any court in the United States; but under this bill, by analogy, it could not be admitted unless the defendant said, "I hate that fellow. He ought to be dead, and I am going to kill him next Saturday night with a pistol." Mr. President, is that fair? Is it designed to give the worker fair protection?

That indicates the way this bill is simply riddled with such hidden knives to strike at the heart of labor. That is why the bill is so much more dangerous than appears on its face.

REMARKS OF SENATOR TAFT
Congressional Record, Senate - June 12, 1947
(7000, 7002) (Legis. History, Vol. II, pp. 1622, 1624)

SUPPLEMENTARY ANALYSIS OF LABOR BILL AS PASSED

Mr. TAFT. Mr. President, in the course of the debate on the conference agreement on H.R. 3020 a number of arguments directed at specific provisions of the bill were made on the floor which were not justified by either the text of the bill or the background of statutes and decisions against which it was written. In addition, numerous completely erroneous statements were made with respect to the effect of certain portions of the bill. In order to make clear the legislative intent, I placed in the CONGRESSIONAL RECORD last Thursday an analysis of its provisions. As I stated at the close of debate on Friday, I consider it advisable to supplement that analysis to cover some mistaken statements made on the floor.

I therefore ask unanimous consent to have printed in the RECORD at this point as a part of my remarks a supplementary analysis.

* * * * *

Section 8(c) Free speech: During the conference the provisions in the Senate bill relating to the right of free speech were rewritten to conform to the House bill so that this subsection now reads as follows: "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit."

Several Senators have assailed this section on the ground that the words "shall not contribute or be evidence of an unfair labor practice" would prevent the Board from applying ordinary rules of evidence in unfair labor practice cases. The purpose of the conferees, as said in the statement I placed in the RECORD at the opening of the debate, was to make it clear that the Board is not to construe utterances containing neither threats nor promises of benefit as an unfair labor practice standing alone or as making some act which would otherwise be legal an unfair labor practice. The conferees had in mind a number of Board decisions in which because of the fact that an employer has at some time committed an unfair labor practice a speech by him, innocuous in itself, has been held not to be privileged. The conferees

did not believe that past misconduct should deprive either employers or labor organizations of the privilege of exercising constitutional rights. There have also been a number of decisions by the Board in which discharges of employees, even though there was no evidence in the surrounding circumstances of discrimination, have been deemed unfair labor practices simply because at one time or another the employer has expressed himself as not in favor of unionization of his employees. The object of this section, therefore, is to make it clear that decisions of this sort cannot be made under the conference bill.

It has been argued, however, that the prohibition against using expressions of opinion as evidence goes much further than the rules with respect to admissibility in a criminal or civil trial. Senators making this argument overlook the fact that the privilege of this subsection is limited to expression of "views, arguments, or opinion." It has no application to statements which are acts in themselves or contain directions or instructions. These, of course, could be deemed admissions and hence competent under the well-recognized exception to the hearsay rule. Numerous comparisons with criminal and civil trials have been made. Consider a more exact comparison. A man is on trial for selling liquor illegally. The fact that he had argued against adoption of the Volstead Act would scarcely be permitted to be used in evidence against him. In a murder trial in which defendant is accused of killing a Republican Senator his political views or opinions would not be competent testimony. Yet the Board has permitted employers' expressions of opinion on unionism to be used to sustain the theory that he was guilty of violations of the National Labor Relations Act.

VETO MESSAGE OF PRESIDENT TRUMAN
Congressional Record, House - June 20, 1947
(7500, 7502) (Legis. History, Vol. I, 915, 918)

To the House of Representatives:

I return herewith without my approval, H.R. 3020, the Labor-Management Relations Act of 1947.

I am fully aware of the gravity which attaches to the exercise by the President of constitutional power to withhold his approval from an enactment of the Congress.

I share with Congress the conviction that legislation dealing with the relations between management and labor is necessary. I heartily condemn abuses on the part of unions and employers, and I have no patience with stubborn insistence or private advantage to the detriment of the public interest.

But this bill is far from a solution of those problems.

* * * * *

(5) The bill would introduce a unique handicap, unknown in ordinary law, upon the use of statements as evidence of unfair labor practices. An anti-union statement by an employer, for example, could not be considered as evidence of motive, unless it contained an explicit threat of reprisal or force or promise of benefit. The bill would make it an unfair labor practice to "induce or encourage" certain types of strikes and boycotts, and then would forbid the National Labor Relations Board to consider as evidence "views, agreement, or opinion" by which such a charge could be proved.

ADDRESS OF SENATOR TAFT
ON VETO OF LABOR RELATIONS ACT
Congressional Record, Senate - June 21, 1947
(A3232-33) Legis. History, Vol. II, 1626-27)

The President attacks the provision giving freedom of speech to employers. The need for such a provision was the one thing admitted even by labor union leaders. The Bill simply provides that views, argument, or opinion shall not be evidence of an unfair labor practice unless they contain in themselves a threat of coercion or a promise of benefit. Without these provisions there would be no freedom of speech on the part of employers any more than there has been for the last 10 years.

APPENDIX F

See enclosed
fold-out poster



A NEW STATE!

A NEW START!



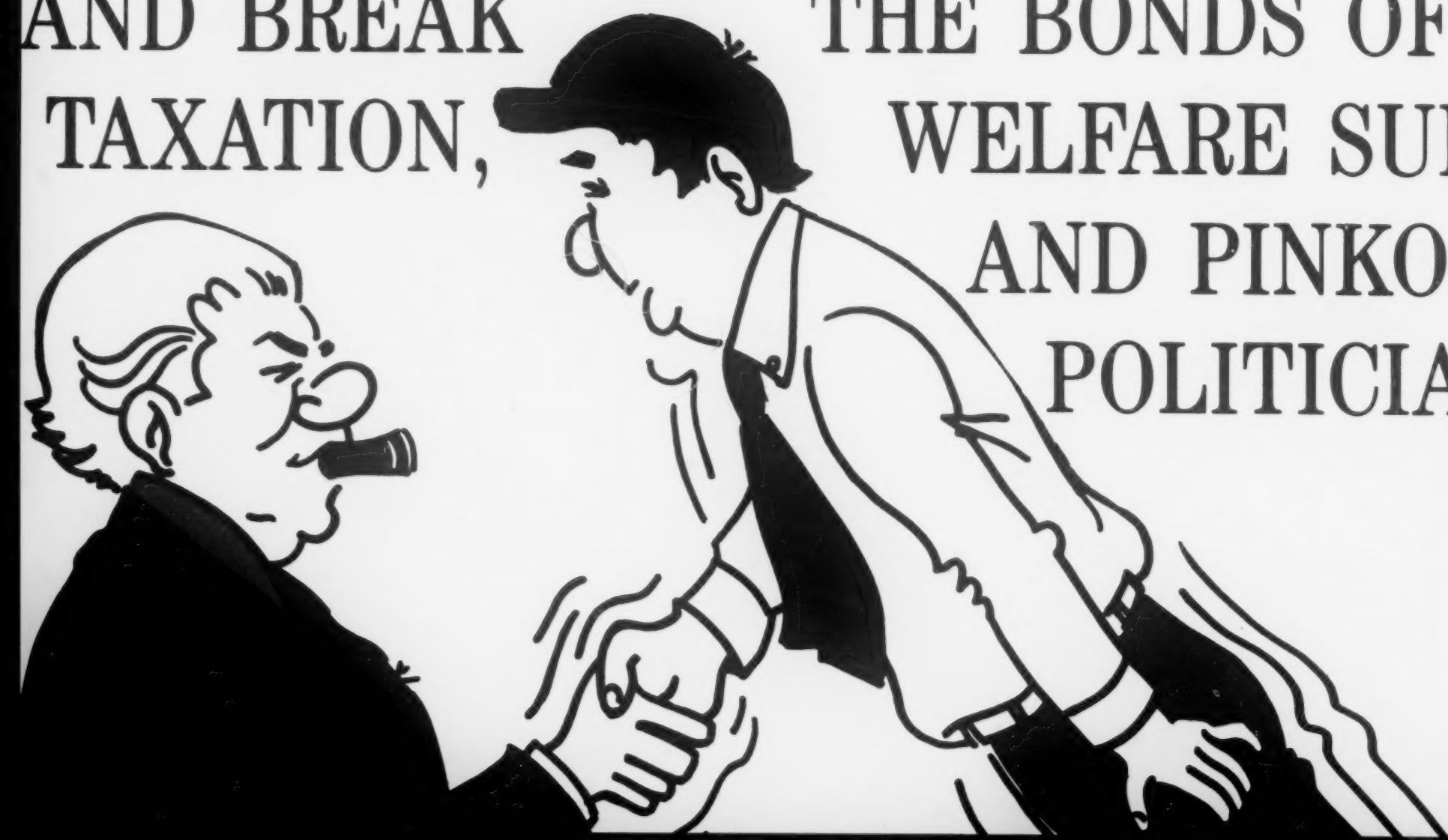
A CALL TO ACTION...



TO ALL FREE-
THINKING
CITIZENS!

RISE UP...

AND BREAK THE BONDS OF OPPRESSIVE
TAXATION, WELFARE SUBSIDIES,
AND PINKO
POLITICIANS.



MAKE THE BREAK...

FROM THE TYRANNY OF DETROIT AND BIG-CITY
DOMINATION OF STATE GOVERNMENT.

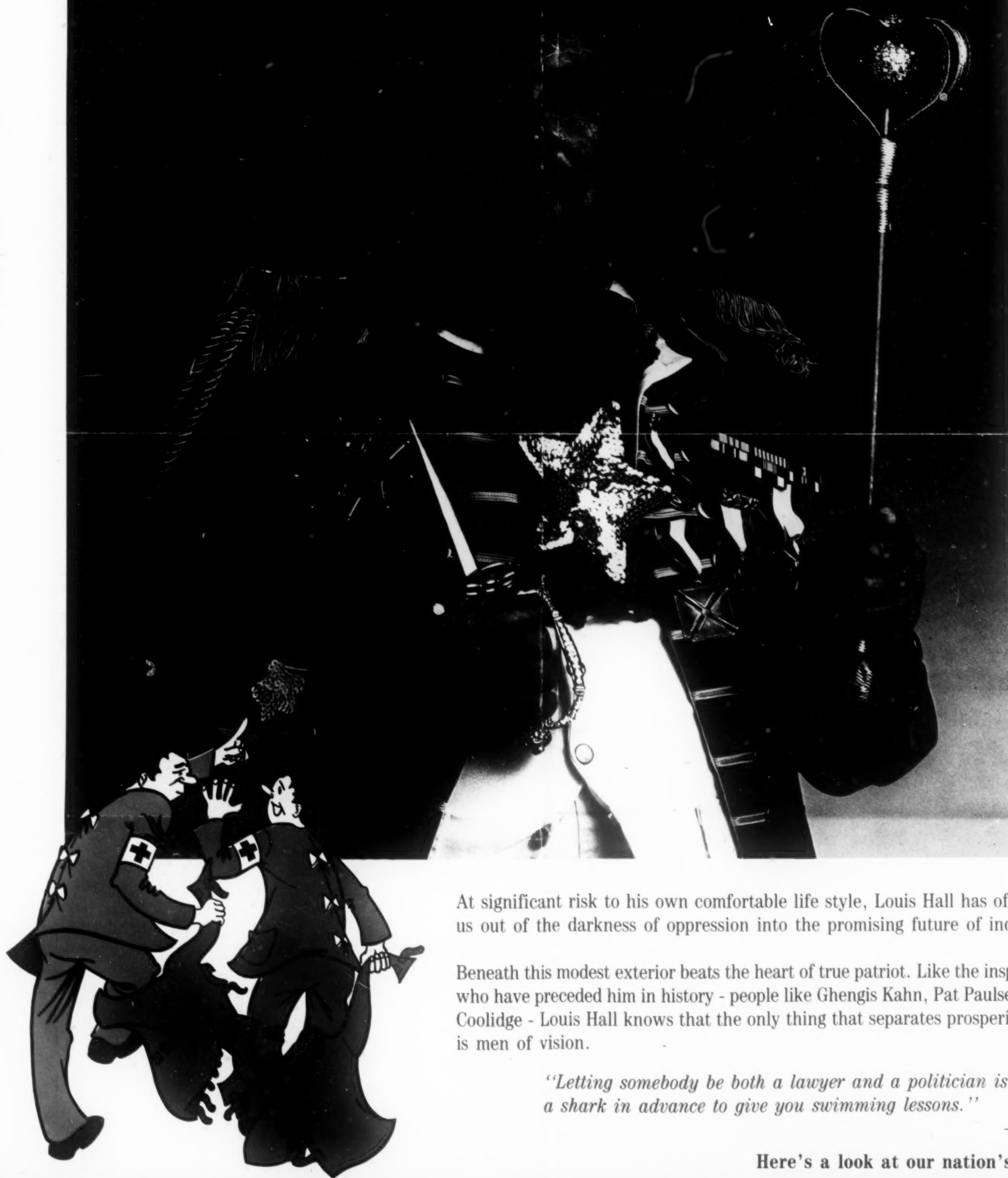


SUPPORT NEW LEADERSHIP...



OF A FREE THINKING, ENERGETIC,
FAIRLY NICE-LOOKING, HONORABLE,
TRUSTWORTHY AND SPIRITED MAN
WHO WILL LEAD US TO OUR RIGHT-
FUL DESTINY....

LOUIS HALL



At significant risk to his own comfortable life style, Louis Hall has offered to lead us out of the darkness of oppression into the promising future of independence.

Beneath this modest exterior beats the heart of true patriot. Like the inspiring leaders who have preceded him in history - people like Ghengis Kahn, Pat Paulsen and Calvin Coolidge - Louis Hall knows that the only thing that separates prosperity and chaos is men of vision.

"Letting somebody be both a lawyer and a politician is like paying a shark in advance to give you swimming lessons."

— Louis Hall

Here's a look at our nation's 51st state

GAMBLING

BEAVER ISLAND: CASINO GAMBLING.

This is an appropriate spot to locate new resorts. People will be able to feed deer and play Blackjack at the same time. With Mackinaw island subject to Naval blockades, people would probably feel more secure about going to a place that they could leave whenever their money ran out.

OFFICIAL STATE SPORT

DUELING

A state of Sixonesix will be the first state to bring back dueling as a legitimate and honorable means of settling disputes. This will hold costs of maintaining a judiciary to an absolute minimum, should hold down bad checks and overdue accounts, and get rid of obnoxious neighbors.

STATE CAPITOL

MACKINAW ISLAND

Through the use of a Naval blockade, we will seal off the island while the state government is in session. Armed gunboats will prevent anybody leaving until the work is done. We cut off electricity after six weeks, and stop food and beverage deliveries after eight weeks.

MIDLAND

MIDLAND NUCLEAR PLANT AND THE DOW CHEMICAL COMPANY.

If Michigan doesn't want them, we'll take them.

OFFICIAL STATE PRINTER

MIDDLE EARTH GRAPHICS

While Louis Hall may be a revolutionary, he's not dumb. He has a new 25" by 38" two-color press that needs to be kept working. The only consideration he asks for is that he gets to do all of the state printing (and while Sixonesix is getting off the ground, Middle Earth Graphics needs a lot of business to help finance this scheme.)

STATE ANIMAL

SNAPPING TURTLE

This perfect symbol of the state philosophy, the snapping turtle usually minds his own business, has a very thick skin, is a fierce guardian of the nest, and will chop a finger off of anybody that disturbs it.

STATE NAME: SIXONESIX

This is from an old Bluefeet Indian expression that means roughly "I'm tired of your dumb cows getting fat off of my maize."
*Distant relatives of the Blackfeet Indians, the Bluefoot Tribe were early natives of Paw Paw.

STATE FLOWER: THISTLE

As a great military leader once stated, "Touch a thistle lightly and you get pricked. But grab it firmly and there's no danger." The leadership of Sixonesix won't be tentative. We're out to insult, abuse, and irritate anybody that gets in the way of our quest for rugged individualism.

Manahigi Quanani Kawawa

This comes from an ancient Viking slogan which translates to: "Buddy, if you don't start pulling your share of the load, you can't go on any more pillaging trips."

KALAMAZOO

STATE FLAG

The distinctive "belt and suspenders" design of the Sixonesix state flag is a symbol that best portrays the conservative philosophy of our citizens. The padlock represents our fiscal policy towards teachers, union bosses, lawyers, and politicians.

DRAWBRIDGE

EASTERN MOAT WITH DRAWBRIDGE.

Access to the state of Sixonesix will be severely restricted. Drawbridges will be raised to keep out such undesirable elements as labor organizers, dead beats, carpehbagging politicians, and itinerant lawyers.



LOUIS HALL'S VIEWS ON:

WELFARE, DEADBEATS, HUCKSTERS, AND LILYLIVERED POLITICIANS.

(excerpts from a recent news conference where weakkneed journalists demonstrate their left-wing reporting and failure to appreciate the kind of qualities that made this country great.)

Q. You can't be serious about this thing are you? It looks like the only people you have left out from your insulting policies are nuns, the retarded, and radio announcers.

A. Yes, I guess I overlooked them.

Q. Isn't the designation of Middle Earth Graphics as the "official state printer" unfair? There certainly have to be a lot of other good printers who should be able to compete for state printing. What are you going to do about them?

A. *Let them start their own state. This was my idea.*

Q. Some people are saying this whole thing is just a publicity stunt and that you really aren't trying to start a new state. Also, sixteen dollars each for the Sixonesix bumper stickers seems like a ridiculous price and it would appear as though you are just trying to sell some extra printing. What have you got to say about that?

A. How many bumper stickers do you want?

Q. Don't you realize how offensive this whole thing sounds? There certainly are some good teachers, honest politicians, capable lawyers, and conscientious union leaders. Doesn't it require more than just self-made businessmen to make a state?

A. Who says?

Q. Many of us are curious about how you were able to get anybody to write and design all of this crap. What kind of an artist or writer would stoop to putting out such offensive and mindless stuff? What method did you use to get them to work on this project?

A. Cash.

2

No. 89-662

Supreme Court, U.S.

FILED

DEC 15 1989

JOSEPH E. SPANOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

MIDDLE EARTH GRAPHICS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by coercing, threatening, transferring, and discharging employees because of their union support.



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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-662

MIDDLE EARTH GRAPHICS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 3a-4a), including the decision and recommended order of the administrative law judge (Pet. App. 5a-43a), is reported at 283 N.L.R.B. No. 1049.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1989. A petition for rehearing was denied on July 6, 1989. Pet. App. 1a. The petition for a writ of certiorari was filed on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act, 29 U.S.C. 157, broadly guarantees to employees the "right to

self-organization." In order to protect that statutory right, Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), prohibits employers from taking any action "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [Section 7]." And Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), specifically prohibits employers from interfering with employees' union activities "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

2. Petitioner is a commercial printer in Kalamazoo, Michigan. Until the spring of 1984, petitioner was a relatively small firm with approximately ten employees. At that time, however, petitioner received a large contract that called for a staff increase, and in particular, hiring more bindery employees. Pet. App. 7a-8a. In June 1984, petitioner's owner, Louis Hall, told two recently hired bindery employees, Garry and Karen Root, that a "union would never 'get in here. I will close my doors before I will let a union in here.'" *Id.* at 9a. Hall also told Lidell Ford, another employee, that he would "close the g.d. doors" before he would permit a union to come into petitioner's shop. *Ibid.* Ford had a similar conversation with petitioner's general foreman, Rod Chalker, who "expressed the opinion that Hall would close the plant before he would permit it to become unionized." *Ibid.*

During the summer of 1984, Wayne Ford, another employee, spoke with petitioner's foreman, Don Antolovich, and "observed that, if the plant were unionized, [petitioner] would stop a lot of activities which Ford objected to, such as twelve-hour workdays and cutting incentive rates." Pet. App. 9a. The foreman responded "that a union would be nice but there was 'no chance of it.'" *Ibid.* Early that fall, Karen Root contacted the United Paperworks Union (the Union); as a result, petitioner's employees began to discuss

the possibility of unionization. After foreman Antolovich learned of these activities, he told bindery employees that petitioner "was keeping a complete file on who talked union at the plant." *Ibid.*

On November 7, 1984, petitioner convened a meeting of its merging line bindery employees. At the meeting, petitioner introduced a representative from Manpower Temporary Services, a local firm that provided businesses with employees on a contract basis. The Manpower representative told the merging line employees that they would have to sign up to be employed by Manpower but would continue to work for petitioner with the same rate of pay and benefits.¹ Later that day, Lidell Ford, a collator, spoke to various merging line employees about the plan to shift those employees to Manpower's payroll. Ford told his co-workers that, if they signed up for Manpower, they would not be eligible to vote for the Union. Foreman Antolovich promptly reported Ford's comments to petitioner's owner, Louis Hall. Pet. App. 11a.

Hall summoned Lidell Ford to his office the following morning. Hall told Ford that he had "written proof that Ford had wilfully damaged * * * [a] collating machine," and fired him. Pet. App. 11a. Ford denied that accusation, asked to see the written statements, and also asked to speak with the employees who had leveled the charges. Hall agreed only to provide Ford with copies of the written statements when he received his final paycheck. Hall reneged on that arrange-

¹ During the next few days, several supervisors suggested that petitioner would require only merging line employees to transfer to Manpower's payroll. For example, general foreman Chalker told Debra Schrock, a collator helper, that she would not have to sign up for Manpower "as long as you don't talk union." Pet. App. 12a.

ment. The record confirms that no such written statements existed at the time Hall fired Ford. *Id.* at 11a-12a.²

On Saturday evening, November 10, Lidell Ford held a union meeting at his home. All those employees present signed union cards. Pet. App. 13a. The following Monday, November 12, petitioner's management, including Hall, and Manpower representatives met with all of petitioner's employees. Hall announced that "all employees, except for the 'original ten,' would be required to transfer from [petitioner's] payroll to the Manpower payroll." *Id.* at 13a, 14a.³ When employees pressed Hall for an explanation of the transfer, his only response was "[n]o comment." *Ibid.* Employees Cole and Cannon "then stated aloud that the only reason the transfer to Manpower was taking place was because of the union." *Ibid.* Hall then stated that the transfer "was taking place so that he could protect himself from what Lidell Ford had done the preceding week." *Ibid.*

When Cannon reported to work the following day, foreman Antolovich told him that he was fired. Pet. App. 14a. On the evening of November 14, employees Garry and Karen Root and Clark Olson attended a union meeting. The three reported to work the following morning wearing union buttons. The Roots and Olson each objected to signing with Manpower, as previously ordered, because they wanted to

² Several days later, foreman Antolovich told employee Patricia Cole that petitioner "was trying to make a case against Lidell Ford," and offered her \$25 if she would "go into court and say she saw Ford tampering with the machinery." Pet. App. 13a. Cole declined to commit perjury, "insisting that she would not lie either for or against Ford." *Ibid.*

³ As the Board observed, Hall's reference to the "original ten" was his "way of describing the employees who had been working for him before the work force expansion took place in the spring of 1984." Pet. App. 14a.

Hall also made clear that all supervisors, pressmen, and office personnel would remain on petitioner's payroll. Pet. App. 14a.

form a union. Petitioner had the police remove those employees from the premises. *Id.* at 15a-16a.⁴

Petitioner managed to transfer nineteen of its employees to Manpower's payroll, although those employees continued to work in petitioner's plant.⁵ Shortly thereafter, the Union, on November 21, filed a petition with the Board to represent petitioner's production and maintenance employees. The Union also filed with the Board a series of unfair labor practice charges against petitioner. Pet. App. 16a.

2. In December 1984, the Board's General Counsel issued an unfair labor practice complaint alleging, among other charges, that petitioner had violated the Act by discharging the following employees because of their union support: Lidell Ford, Wayne Ford, Garry and Karen Root, James Cannon, and Clark Olson. Instead of proceeding to a hearing, the parties, in April 1985, executed an informal settlement agreement. Under that settlement, petitioner agreed to pay specified amounts of back pay to the six employees, to offer them full and immediate reinstatement to their former jobs without prejudice to their seniority or other rights and privileges previously enjoyed, and to cease and desist from further unfair labor practices. Pet. App. 17a.

Petitioner, however, breached the settlement agreement by not offering the discriminatees immediate reinstatement.

⁴ Petitioner also fired Wayne Ford for refusing to sign with Manpower. Pet. App. 16a.

⁵ Among those transferred employees was Houston Ford, Lidell Ford's brother. Sometime in late November, Hall told Houston Ford that he had fired Lidell because he "had been harassing employees and had tampered with the collator." Pet. App. 16a. Hall volunteered that "Lidell was trying to bring a union into the plant, and there was 'no way in hell' that [Hall] would permit a union to come into the company." *Ibid.*

ment.⁶ Instead, in early May petitioner notified each discriminatee by letter that, although “you are reinstated to your former position,” “[d]ue to lack of production requirements, there is no work available for you at this time.” Pet. App. 17a, 18a.⁷ All six of the discriminatees had been permanent, full-time employees. *Id.* at 33a. With the possible exception of Karen Root, none of them received a bona fide offer of reinstatement to his or her former job or to a substantially equivalent position. For example, when Lidell Ford reported back to work, petitioner assigned him work that required considerably more skill than his previous assignment. When, as expected, Ford had difficulty handling the new assignment, petitioner refused to train him and later insisted that Ford sign a statement that he was unable to perform the assigned work. In addition, reciting allegations that were factually false, petitioner reprimanded Ford for reporting late. As a result of these incidents, petitioner assigned Ford to a new job that paid substantially less than his previous position. Ford continued actively to promote the union cause. After a month, petitioner laid off Ford, along with Karen Root, ostensibly for lack of work. *Id.* at 22a-24a, 33a, 36a.⁸

⁶ Petitioner paid the backpay due under the agreement. Pet. App. 17a.

⁷ During this period, petitioner rehired nine former employees that had been transferred to Manpower’s payroll. Pet. App. 18a.

⁸ Petitioner treated the other four discriminatees in a similar manner. Petitioner offered Garry Root a part-time job, without benefits. Petitioner did not adequately notify James Cannon of a reinstatement offer and later rebuffed Cannon’s attempts to discuss the matter. Petitioner told Wayne Ford, whose telephone was disconnected, that he must have a working telephone in order to return to work — a plain violation of the settlement agreement. Petitioner later fired Ford for disregarding a message to report to work — a message Ford had never received. Pet. App. 19a-22a, 34a.

Petitioner's breach of the settlement agreement prompted the Union to file additional unfair labor practice charges. The Board's General Counsel issued an amended complaint against petitioner. The original and amended complaints were consolidated for a hearing before an administrative law judge in late January and early February 1986.

3. Adopting the findings and conclusions of the ALJ, the Board found that petitioner had violated Section 8(a)(1) and (3) of the Act by coercing, threatening, transferring, and discharging employees because of their union support. Pet. App. 5a-43a.⁹ Before turning to specific violations charged in the complaint, the Board observed that a brochure prepared and distributed by petitioner at a November 2 promotional open house "demonstrated clear evidence of animus which should be considered in placing the [pertinent] events * * * in proper focus." *Id.* at 9a, 25a.¹⁰

⁹ The Board specifically found that petitioner had violated Section 8(a)(1) of the Act by threatening employees with plant closure, discharge, and other reprisals, by coercively questioning employees about their own and their co-workers' union activities, by creating the impression that petitioner was monitoring employee union activities, and by trying to bribe an employee to commit perjury in connection with petitioner's firing of a union activist. Pet. App. 26a-27a. The Board also found that petitioner had violated Section 8(a)(1) and (3) of the Act by firing employees Garry and Karen Root, Clark Olson, and Wayne Ford as a direct result of its transfer of bindery employees to Manpower's payroll, where petitioner had taken that step in order to stave off a nascent unionization effort. Pet. App. 29a-31a. The Board further found that petitioner had violated Section 8(a)(1) and (3) of the Act by firing employees Lidell Ford and James Cannon because of their union support. Finally, the Board found that petitioner had breached the settlement agreement by failing properly to reinstate discharged employees and by discriminating further against Lidell Ford, Karen Root, and Wayne Ford, in violation of Section 8(a)(1) and (3) of the Act. Pet. App. 4a, 31a-36a.

¹⁰ That brochure was "a humorous elaboration of Hall's tongue-in-cheek proposal for a new 51st state, to be carved out of the existing

The Board then found that petitioner had committed ten separate violations of Section 8(a)(1) of the Act in the course of opposing its employees' union activity. See Pet: App. 26a-27a.

Turning to petitioner's firings of Lidell Ford, Wayne Ford, Garry and Karen Root, James Cannon, and Clark Olson, the Board initially observed that petitioner knew that all six employees were union sympathizers and that each employee had been fired by "[a]n employer whose intense and implacable anti-union sentiments ha[d] been itemized and documented" in the previous Section 8(a)(1) findings. Pet. App. 27a; see *id.* at 26a-27a. The Board specifically found that petitioner's firing of Lidell Ford "was a clumsy fabrication from beginning to end." *Id.* at 28a. The Board determined that Ford's discharge, "[c]oming as it did one day after Ford had urged mergers to refrain from signing up for Manpower so they could continue their organizing efforts, * * * was the direct result of [his] union activities, which were the only reason for his termination." *Id.* at 28a-29a. The Board similarly found that petitioner's firing of Cannon, who "[l]ike L. Ford, * * * was discharged within twenty-four hours after making a pro-union statement in the presence of supervisors," was triggered by his expression of union sympathies. *Id.* at 29a.

Finally, the Board rejected petitioner's claim that "considerations falling within the scope of business judgment"

state of Michigan and named Six-One-Six after the telephone area code for Western Michigan." Pet. App. 25a. The brochure depicted Six-One-Six as an area of great business potential and identified Hall as a leading force in the community. The brochure stated that "[a]ccess to the State of Six-One-Six will be severely restricted." *Ibid.* And, using the medieval imagery of moats and drawbridges, the brochure proclaimed that "[d]rawbridges will be raised to keep out such undesirable elements as labor organizers." *Ibid.*; see also *id.* at 65a (color reprint of brochure).

prompted its decision to transfer to Manpower all of its employees other than the "original ten." Pet. App. 29a-30a. The Board found that petitioner made that decision when union activity began to surface at the plant, and that "the economic benefits and cost effectiveness of the move were only casually considered by [petitioner] before the decision was taken, if, indeed, such matters were considered at all." *Id.* at 30a. The Board further noted that petitioner had initially decided to replace merging line employees with Manpower employees, but "[w]hen evidence evolved that union sentiment was spreading throughout the plant, [petitioner] enlarged upon its original plan and discharged all of its bindery employees" to prevent unionization, and "as a part of [that] defensive scheme," fired Garry and Karen Root, Wayne Ford, and Clark Olson. *Id.* at 31a.

4. The court of appeals enforced the Board's order in an unpublished decision. Pet. App. 2a. The court concluded that "the findings and order of the Board are in accordance with the law and supported by substantial evidence." *Ibid.* The court therefore held that petitioner had violated Section 8(a)(1) and (3) of the Act by coercing, threatening, transferring, and discharging employees because of their union support.

ARGUMENT

1. Petitioner contends (Pet. 8-21) that the Board, in finding that the firm had violated Section 8(a)(1) and (3) of the Act, improperly relied on petitioner's promotional brochure, which is protected speech under Section 8(c) of the Act, 29 U.S.C. 158(c).¹¹ Petitioner, however, did not

¹¹ Section 8(c) provides:

The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or

raise that issue before the Board. Consequently, Section 10(e) of the Act, 29 U.S.C. 160(e),¹² bars judicial review of that claim. *E.g., Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982). For that reason alone, further review of petitioner's claim should be denied.

In any event, the claim is meritless. The Board and the courts of appeals have long held that expressions of opposition to unionism, although not in themselves unlawful, may be considered as background evidence in deciding whether other acts committed by the employer violated the National Labor Relations Act. As one court has remarked, "[t]here is a vast difference between the use of protected statements as evidence of an unfair labor practice, and the use of such statements to draw the background of the controversy and place other nonverbal acts in proper perspective. The latter is all the Board did here." *International Union, UAW v. NLRB*, 363 F.2d 702, 707 (D.C. Cir.), cert. denied, 385 U.S. 973 (1966); accord *NLRB v. Wright Line, Inc.*, 662 F.2d 899, 907 n.14 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); *NLRB v. General Electric Co.*, 418 F.2d 736, 761 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970); *Orchard Corp. of America v. NLRB*, 408 F.2d 341, 342 (8th Cir. 1969); *Darlington Mfg. Co. v. NLRB*, 397 F.2d 760, 769 (4th Cir. 1968) (en banc), cert. denied, 393 U.S. 1023 (1969); *Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100, 103 (5th Cir. 1963); *NLRB v. Putnum Tool Co.*, 290 F.2d 663, 665 (6th Cir. 1961); *NLRB v. Kropp Forge Co.*, 178 F.2d

visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

¹² Section 10(e) provides in pertinent part that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

822, 827-828 (7th Cir. 1949), cert. denied, 340 U.S. 810 (1950).¹³

In this case, petitioner has not seriously challenged the Board's findings that it committed numerous violations of Section 8(a)(1) of the Act.¹⁴ And, in concluding that

¹³ None of the decisions cited by petitioner (Pet. 8-10), see, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); and *NLRB v. United Steelworkers*, 357 U.S. 357 (1958), suggests, let alone holds, that the Board may not use as background material statements protected by Section 8(c). In *NLRB v. Gissel Packing Co.*, for example, the Court, among other things, addressed the standards governing the threshold determination whether employer anti-union statements were protected speech under Section 8(c). 395 U.S. at 616-620. And in *NLRB v. United Steelworkers*, the Court held, under the facts presented, that employers' enforcement of rules prohibiting union organizational solicitation did not constitute unfair labor practices. 357 U.S. at 361-365. The Court's passing reference to Section 8(c), see 357 U.S. at 362 (Section 8(c) protects employer's right to "engage in non-coercive anti-union solicitation"), scarcely supports petitioner's novel construction of that provision.

In *Linn v. Plant Guard Workers*, the Court held that Section 8(c) did not preempt a state-law cause of action for malicious libel occurring during a union organizing campaign. 383 U.S. at 55, 57-66. Although the Court stated that Section 8(c) "prevent[s] the Board from attributing anti-union motive to an employer on the basis of his past statements," 383 U.S. at 62-63 n.5, the Court did not read that provision as precluding the Board from considering such a statement as background, along with other evidence, to determine an employer's anti-union motive in unfair labor practice proceedings. Finally, in *NLRB v. Exchange Parts Co.*, the Court held that Section 8(a)(1) prohibits an employer from conferring economic benefits on its employees shortly before a representation election, where the employer's purpose is to affect the outcome of that election. 375 U.S. at 409-410. There, the Court had no occasion to consider the relevance of an employer's Section 8(c) statements to motive because the employer's "motive [was] otherwise established." *Id.* at 410.

¹⁴ Indeed, petitioner has avoided discussion of those findings. But "unchallenged [findings of violations] * * * do not disappear by not

petitioner's actions were motivated by hostility to unionization, the Board relied on the now uncontested "specific violations of [Section 8(a)(1)] of the Act alleged and found in this case." Pet. App. 25a, 26a-27a. In these circumstances, therefore, Section 8(c) did not preclude the Board from considering petitioner's brochure as background evidence. That brochure "revealed nothing of substance not shown by other evidence," nor did the brochure "add to, [or] detract from" the quantum of evidence needed to support the Board's decision. *Darlington Mfg. Co. v. NLRB*, 397 F.2d at 769.

Contrary to petitioner's claim (Pet. 17-21), the courts of appeals have not adopted a construction of Section 8(c) that precludes the Board from considering otherwise lawful employer anti-union statements for background purposes in resolving unfair labor practice charges. Rather, the courts have held only that statements protected by Section 8(c) may not themselves give rise to violations of the National Labor Relations Act.¹⁵ In *NLRB v. Colvert Dairy Products Co.*, 317 F.2d 44, 46 (10th Cir. 1963), for example, the court of appeals held that the Board may not use an employer's protected statements during a union drive "as a basis authorizing an unfavorable inference in the appraisal of [the employer's] conduct and the credibility of its witnesses." The court, however, made clear that it was "not inferring that evidence of [anti-union] attitude is not material to or admissible in the determination of intent or the judging of

being mentioned in a brief. They remain, lending their aroma to the context in which the [contested findings] * * * are considered." *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982).

¹⁵ For that reason as well, petitioner errs in suggesting (Pet. 16-21) that panels in the First, Sixth, and Eighth Circuits have reached conflicting decisions regarding the application of Section 8(c). And even if such intra-circuit conflicts existed, those conflicts would not call for further review by this Court. See, e.g., *Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

credibility in labor cases. It often is." *Ibid.* Similarly, in *NLRB v. Rockwell Mfg. Co.*, 271 F.2d 109, 117-119 (3d Cir. 1959), the court of appeals held that the Board may not use an employer's protected statements as a basis for concluding that the employer's otherwise proper inquiries and statements amounted to coercive unfair labor practices. And in *Indiana Metal Products Corp. v. NLRB*, 202 F.2d 613, 617 (7th Cir. 1953), the court of appeals concluded that, without other probative evidence establishing union animus, the Board could not rely on an employer's non-coercive letters explaining its opposition to unionization to support an unfair labor practice charge of a discriminatory firing.

3. Finally, petitioner contends (Pet. 21-22) that the Board's findings that petitioner committed unfair labor practices are not supported by substantial evidence. In light of the record before both the Board and the court of appeals, see, *e.g.*, pp. 2-6, *supra*, that contention is groundless. In any event, petitioner's fact-specific claim is plainly undeserving of this Court's attention. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-491 (1951).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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DECEMBER 1989



No. 89-662

**IN THE SUPREME COURT
OF THE
UNITED STATES**

October Term 1989

MIDDLE EARTH GRAPHICS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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DISCUSSION

Petitioner contends that the National Labor Relations Board (Board), in finding that Petitioner had violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act), improperly relied on Petitioner's promotional poster brochure (Petition for Writ of Certiorari, Appendix F, p. 65a), which is protected speech under Section 8(c) of the Act, 29 U.S.C. 158(c). In its brief in opposition, however, the Board now maintains that Petitioner failed to raise that issue before the Board and thus, Section 10(e) of the Act, 29 U.S.C. 160(3), bars judicial review of that issue.

Respondent's contention is simply incorrect. On August 5, 1986, in case number 7-CA-24013 *et al.*, Petitioner filed timely Exceptions to the Administrative Law Judge's decision to the Board. Such filing was made pursuant to the Board Rules and Regulations, 29 C.F.R. part 102.46. Both Exception 41 and Exception 42 specifically addressed the issue:

EXCEPTIONS TO THE DECISION

<u>No.</u>	<u>Page and Lines</u>	<u>Exception</u>
41	p. 17; lines 8-34	To the characterization of the poster submitted as a Respondent exhibit as evidencing anti-union animus on the part of Respondent.

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p. 17; lines 33-34

To the failure to find that Hall's statement that he was opposed to unions "just in six-one-six" was a tongue and cheek response in the same vein as the poster itself.

On May 19, 1987, the Board affirmed the decision of the administrative law judge after considering his decision and the record, "in light of the *exceptions* and brief" of Petition herein (Petition for Writ of Certiorari, Appendix C p. 3a). (Emphasis supplied).

On March 1, 1988, the Board filed a Petition for Enforcement with the U.S. Court of Appeals for the Sixth Circuit. On September 21, 1988, Petitioner filed a timely brief with the Sixth Circuit which again raised the issue regarding the use of the poster to establish evidence of anti-union animus. On November 8, 1988, the Board filed its brief with the Sixth Circuit. The Board claimed that such use of the poster was permissible and did not claim that the issue was waived by Petitioner.

On April 24, 1989, the Sixth Circuit issued a *Per Curiam* decision enforcing the Board's Order. (Petition for Writ of Certiorari, Appendix B. p.2a). On May 5, 1989, Petitioner filed a timely Petition for Rehearing with the Sixth Circuit, which again raised the issue regarding the use of the poster to establish evidence of anti-union animus. On June 15, 1989, the Board filed its Response to the Petition for Rehearing and again addressed the issue on the use of the poster. Again the Board did not claim that Petitioner had waived that issue.

Petitioner's claim that the Board improperly relied upon Petitioner's promotional brochure, which is protected speech under section 8(c) of the Act, to establish evidence of anti-union animus, was urged at all levels of review, and thus, judicial review of that issue is in no way barred. *See Detroit Edison Company v. NLRB*, 440 U.S. 301, 311, (1979), *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982).

The case is therefore ripe for consideration by the Court and presents a clear vehicle for determination on the use of protected free speech as background evidence to establish anti-union animus.

DATED: January 2, 1990

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